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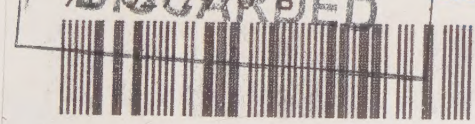
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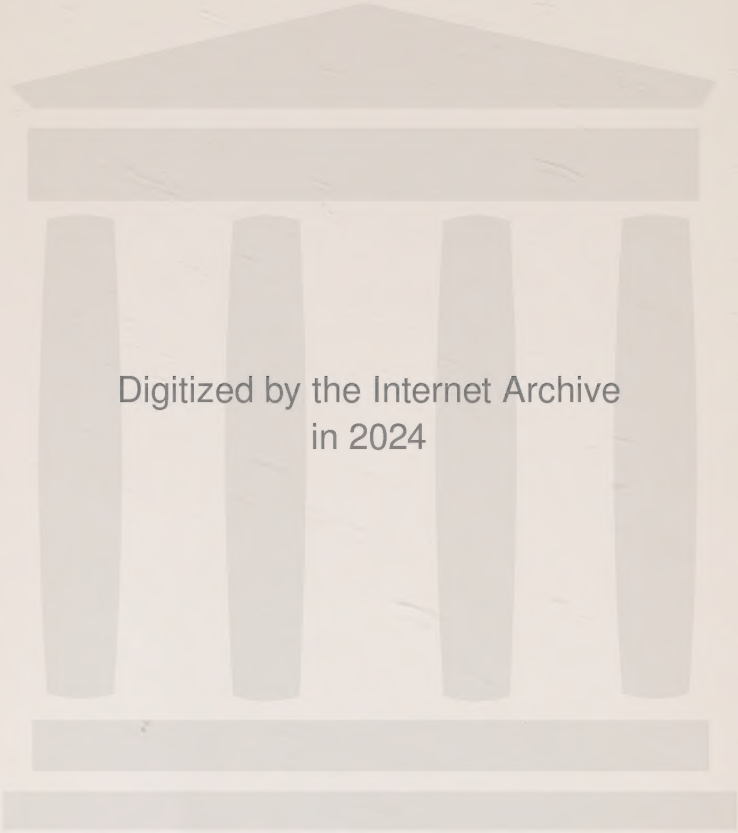
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THE LAW REPORTS

9 Queen's Bench

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THE

LAW REPORTS.

Court of Queen's Bench.

REPORTED BY

WILLIAM MILLS AND HENRY HOLROYD,
BARRISTERS-AT-LAW.

AND

In the Bail Court,

BY

ARTHUR WILSON,
BARRISTER-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. IX.

FROM MICHAELMAS TERM, 1873, TO TRINITY TERM, 1874,
BOTH INCLUSIVE.
XXXVII VICTORIA.

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JUDGES

OF

THE COURT OF QUEEN'S BENCH.

XXXVII VICTORIA.

The Right Hon. Sir Alexander James Edmund Cockburn, Bart., C.J.
Sir Colin Blackburn, Knt.
Sir John Mellor, Knt.
Sir Robert Lush, Knt.
Sir John Richard Quain, Knt.
Sir Thomas Dickson Archibald, Knt.

ATTORNEYS GENERAL.

Sir Henry James, Knt.
Sir John B. Karslake, Knt.
Sir Richard Baggallay, Knt.

SOLICITORS GENERAL.

Sir W. V. Harcourt, Knt.
Sir Richard Baggallay, Knt.
John Holker, Esq.

ERRATA.

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21	..	18	..	grantee	..	grantor.
116	..	Note (2)	..	49	..	1.
300	..	18	..	*Withall & Compton*	..	*Symes, Sandilands, & Humphery.*
462	..	11	..	plaintiff was able	..	defendant was able.
570	..	3	..	true	..	then.

Add

6	..	Note (4)	..	and 34 & 35 Vict. c. 70, s. 2.
116	..	Note (2)	..	Law Rep. 5 P. C. 134.

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CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXVII VICTORIA.

Ex parte MOSES.

1873
Nov. 10.

Attorney and Solicitor—Articled Clerk—"Actual Employment as Attorney"—6 & 7 Vict. c. 73, ss. 12, 14.

M. was articled to an attorney in July, 1868, for five years, and served till June, 1871, when, owing to illness, under medical advice, and with consent of his master, he went a voyage to Australia. He returned to England in June, 1872, and at once resumed his service till July, 1873, when his term expired. He passed his final examination in Trinity Term, 1873, and applied for leave to be admitted in Michaelmas Term, 1873:—

Held, that the eleven months, during which the clerk had been absent, could not be counted as service; as he had not been "actually employed" as an attorney or solicitor during the whole of the five years, as required by 6 & 7 Vict. c. 73, s. 12.

On the 2nd of July, 1868, Henry William Moses was bound by articles of clerkship to an attorney at Liverpool for five years. He duly served under them till July, 1871, when, in consequence of ill health, and under medical advice, he, with the consent of his master, ceased to attend at the office for several weeks. His health

1873

EX PARTE MOSES.

being no better, under medical advice, and, with the consent of his master, he left England for a voyage to Australia in October, 1871; after a short stay there he returned, and arrived in England in June, 1872, and at once resumed his service with his master and the London agents until the expiration in July last of his term of five years. He was examined pursuant to a judge's order during last Trinity Term, and passed his final examination.

Wildey Wright applied, on his behalf, that the eleven months during which he was absent might be counted as service, so as to enable him to comply with ss. 12 and 14 of 6 & 7 Vict. c. 73 (1), and that he be admitted an attorney of this Court during the present term. In *Ex parte Matthews* (2), an articled clerk was allowed to count more than two years during which he was absent at different intervals from service; and in *Ex parte Hodge* (3), an absence of more than a year at once owing to illness was allowed to the clerk as service.

[BLACKBURN, J. Section 12 of the present Act requires that the clerk, during the whole time of service under the articles, shall be actually employed in the business of an attorney.]

The Act (22 Geo. 2, c. 46, s. 8), under which the service of articled clerks was regulated when those cases were decided, had precisely similar language.

[BLACKBURN, J. In *Ex parte Hodge* (3), I observe that Littledale, J., while granting the application, evidently felt that he was going too far.]

The absence there was for more than a year. Here it was only for eleven months at the furthest. In *Ex parte Brutton* (4) which is since the present Act, Coleridge, J., allowed service with another attorney to count as service with the master.

(1) By 6 & 7 Vict. c. 73, s. 12: "Every person who now is, or hereafter shall be bound by contract in writing to serve as a clerk to any attorney or solicitor shall, during the whole time and term of service to be specified in such contract, continue and be actually employed by such attorney and solicitor in the proper business, practice, or employment of an attorney or solicitor, save only and except in the cases hereinbefore mentioned."

By s. 14, every clerk, before admission as attorney or solicitor, has to file an affidavit that "he has actually and really served and been employed" as above.

(2) 1 B. & Ad. 160.

(3) 2 Jur. 989.

(4) 23 L. J. (Q.B.) 290.

[BLACKBURN, J. There, at all events, the clerk had been employed as an attorney.]

BLACKBURN, J. I am of opinion that we ought not to grant this application. The clerk must serve under the same or fresh articles, so as to complete his five years. The statutes require the clerk to be bound for five years, and to serve during the whole of the term; the object being that he may acquire not only legal knowledge but practical experience. Sect. 12 is very explicit [the learned judge read the section]. It is true that the applicant has passed his examination satisfactorily; but he has not had the practical experience which the section requires, having been absent altogether for eleven months. I, of course, do not say that the service need be every day or all day; a reasonable amount of absence for holidays, or short intervals of absence owing to sickness, would not prevent the service counting. But when, as in the present case, the clerk is absent for eleven months at once on a long sea-voyage to the antipodes, he can have been acquiring no experience at all. The same argument would apply if the clerk had served but for a day or two, and had then been absent for the whole of the four or five years. Slight interruptions would not prevent the clerk from having served, but with so long a break-off as eleven months, we cannot say that the clerk has been actually employed during the whole term of five years in the proper business of an attorney.

QUAIN and ARCHIBALD, JJ., concurred.

Application refused.

Attorney for applicant: *T. Noton.*

1873
Nov. 12.

HESKETH, APPELLANT; THE LOCAL BOARD OF ATHERTON, RESPONDENTS.

Public Health Acts (11 & 12 *Vict. c.* 63, *s.* 69; 15 & 16 *Vict. c.* 42, *s.* 13; 21 & 22 *Vict. c.* 98, *s.* 63)—"*Street not being a Highway*"—*Enforcing Payment of Expenses of Paving—Apportionment of Surveyor, how far Conclusive.*

By 11 & 12 Vict. c. 63, s. 69, and 15 & 16 Vict. c. 42, s. 13, a local board may require the owners of the houses in a street, not being a highway repairable by the inhabitants at large, to sewer, level, and pave it, and in default of the owners the board may do the work, and the expenses are to be paid by the owners in proportion to their frontage, the proportion to be settled by the surveyor, and in case of dispute by arbitration; and by 21 & 22 Vict. c. 98, s. 63, the apportionment of the surveyor shall be binding and conclusive upon every owner, unless within three months from the notice of the amount of the proportion, he shall by written notice dispute the same. A local board having duly proceeded under the Act, and sewered, &c., a street, and no notice having been given by an owner that he disputed the apportionment, the board sought to enforce before justices the payment of the proportion charged:—

Held, that it was still open to the owner to dispute his liability, and to shew that the street was a highway repairable by the inhabitants at large.

CASE stated by Justices of Lancashire, under 20 & 21 Vict. c. 43.

An information was laid by the respondents against the appellant for not paying 88*l.*, the expenses of sewering, levelling, and paving part of Park Street, situate in the respondents' district.

At the hearing it was proved that the respondents, on the 16th of May, 1871, served the appellant, as owner of property abutting on Park Street, with a notice to sewer, level, and pave the street within twenty-eight days, and on the appellant's default the respondents did the work, and the expenses were apportioned by the surveyor, and notice of such apportionment was served upon the appellant on the 7th of March, 1872. No notice had been given by the appellant, within the three months, that he disputed the apportionment. (1)

(1) 11 & 12 Vict. c. 63, s. 69. "In case any present or future street, or any part thereof, not being a highway [repairable by the inhabitants at large: 15 & 16 Vict. c. 42, s. 13], be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such board may, by notice in writing to the respective owners or occupiers of the premises, fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level,

For the appellant it was contended, inter alia, that it was incumbent upon the respondents, and necessary for the support of their case, that it should be shewn that Park Street was not a highway repairable by the inhabitants at large, and that in default of such proof no order could be made upon the appellant; and the appellant also tendered evidence for the purpose of proving that the street was such a highway.

The respondents objected, that, three months having elapsed since the making of the apportionment and service of notice thereof on the appellant, the appellant, not having given written notice to dispute the same, was precluded, under s. 63 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), from giving this or any evidence going to shew his non-liability. The appellant contended that the effect of s. 63 was simply to preclude him from contesting the fairness of the apportionment as a matter of calculation, and did not debar him from giving evidence going to the root of his liability; that he was still at liberty to shew that nothing at all was due, inasmuch as he never had been liable to repair the street, and that under 21 & 22 Vict. c. 98, and 11 & 12 Vict. c. 63, he was entitled to give the evidence tendered.

pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

21 & 22. Vict. c. 98, s. 63. "Notwithstanding anything in the Public Health Act contained, in all cases where by such Act the local board shall have incurred expenses, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable by the Public Health Act, 1848, or any Act incorporated therewith, or by this Act, and such expenses have been settled and apportioned by the surveyors as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given by the local board or their surveyor of the amount of the proportion so settled by the said surveyor to be due from such owner he shall by written notice dispute the same."

1873

HESKETH v. ATHERTON LOCAL BOARD.

The justices, being of opinion that it was not necessary that the respondents should shew that Park Street was not a highway repairable by the inhabitants at large, and that evidence on the part of the appellant was not admissible to shew that the street was such a highway, as he had not, by written notice, disputed the apportionment within three months from the time when notice thereof was given to him, made an order upon him to pay the sum claimed and costs.

The questions for the Court, inter alia, were, 1st, whether, under the circumstances, it was necessary for the respondents to shew that Park Street was not a highway repairable by the inhabitants at large; secondly, whether the evidence tendered by the appellant was properly rejected.

R. G. Williams, for the appellant. The justices were wrong in refusing to go into the question of highway. Under s. 69 of 11 & 12 Vict. c. 63, and 15 & 16 Vict. c. 42, s. 13, it is only if the street be not a highway repairable by the inhabitants that the board can proceed to sewer, level, and pave it; and they must first give notice to the owners of the houses. Both these are conditions precedent: *Jarrow Local Board* v. *Kennedy*. (1) It is said, however, that s. 63 of 21 & 22 Vict. c. 98, makes the apportionment binding and conclusive if the owners of the houses do not give notice that they dispute it within three months. But it can only be binding and conclusive as to amount, it cannot be conclusive as to liability; for if the owners had disputed it, and had gone before an arbitrator, or justices if the amount were below 20*l.*, under s. 64 of 21 & 22 Vict. c. 98, the only question which could have been raised would have been the propriety of the amount: see the judgments in *Bayley* v. *Wilkinson* (2) and *Cook* v. *Ipswich Local Board*. (3)

[QUAIN, J. Up to the time of enforcing payment before justices, how can the question be raised? (4)]

Herschell, Q.C., for the respondents. By s. 63 of 21 & 22 Vict. c. 98, the apportionment is to be conclusive as to the amount *payable* by such owner if he does not give notice that he disputes it within three months. The words are quite general. It was intended

(1) Law Rep. 6 Q. B. 128.

(2) 16 C. B. (N.S.) 161, 189; 33 L. J. (M.C.) 161, 166.

(3) Law Rep. 6 Q. B. 451, 462.

(4) See 11 & 12 Vict. c. 63, s. 120, and 21 & 22 Vict. c. 98, s. 65.

by this enactment to allow the matter to be open to dispute for three months; and after that time that there should be no dispute; and there is obvious convenience in not allowing such a matter to remain open for an indefinite time.

R. G. Williams was not heard in reply.

BLACKBURN, J. The matter seems very clear. By the original Act, 11 & 12 Vict. c. 63, s. 69, it was enacted: [The learned Judge read the section. (1)] Two things were necessary before the local board could proceed to pave a street, first, that the street was not a highway, which by a subsequent Act is interpreted to mean a highway repairable by the inhabitants at large; and, secondly, that they had given proper notice to the owners of the houses; and, further, it is enacted, that in case of dispute the proportion in which the expenses are to be paid is to be settled by arbitration. Then by 21 & 22 Vict. c. 98, s. 63, it is enacted: [The learned judge read the section. (1)] What is there said is, that the apportionment made by the surveyor shall not be disputed after three months. And there is obvious reason in this. The expenses are to be apportioned amongst all the owners, who may be numerous; and if the apportionment could be successfully disputed at any time by any one owner, it would alter the proportion to be paid by the rest. It was, therefore, in the highest degree desirable that some reasonable time should be fixed, after which the apportionment should be taken as conclusively settled, and each owner should know that the apportionment was right and what he would have to pay. But that reason does not apply to the question whether the sum expended is chargeable at all upon the owners of the houses. Now, unless the street were not a highway, the owners would not be liable; and there seems no means of raising this question (2), except by refusing to pay when asked, and waiting till the payment is sought to be enforced before justices; and if it be then proved, as a fact, that the street is an ancient highway repairable by the inhabitants at large, it would be most unjust if the owners were compelled to pay merely because they had not disputed the apportionment. But it is not so; s. 63 is confined to the apportionment, and it is that, and that alone, that is made conclusive

(1) See ante, p. 4, note (1). (2) See ante, p. 6, note (4).

1873

HESKETH v. ATHERTON LOCAL BOARD.

and binding. The justices, therefore, were wrong in deciding that it was not open to the appellant to prove that the street was an ancient highway, and judgment must be for the appellant.

QUAIN, J. I am quite of the same opinion. It is clear that by s. 63 all that is made binding on the owners is the apportionment according to their frontage, and if a notice had been given by the appellant that he disputed the apportionment, and the matter had gone before an arbitrator, it is quite clear that this question of highway or no highway could not have been raised. It is equally clear that if a street be a highway, the local board have no right to sewer and pave it at the expense of the owners of the houses; and in order to prove the liabilty of the owners they must prove that it is not a highway. And the question could only be raised when the matter is brought before the justices. (1) The money expended in the present case will be recoverable, however, but instead of being chargeable to the owners of the houses, it will be charged to the general rate. As long ago as 1856 there was a case of *Hull Local Board* v. *Jones* (2), which was an action of debt to enforce the payment of the expenses of paving a street, and it never occurred to anyone that the question of highway could not be raised; and if so, the same question must be open when it is sought to enforce the payment before justices.

ARCHIBALD, J. The local board are only empowered to impose the expenses of paving a street upon the owners of the houses in the case of the street not being a highway. The owners have no opportunity of raising and disputing this question effectively until the case is before the justices (1); and it would be very hard if the construction of s. 63 contended for by the respondents was right. But the language of the section is quite clear: it is the apportionment only that is made conclusive and binding on the owners, assuming the liability to exist.

Judgment for the appellant.

Attorney for appellant: *Golding.*

Attorneys for respondents: *Chester, Urquhart, & Co., for Holden & Holden, Bolton.*

(1) See ante, p. 6, note (4). (2) 1 H. & N. 489; 26 L. J. (Ex.) 33.

THE PIMLICO, PECKHAM, AND GREENWICH STREET TRAMWAY COMPANY, APPELLANTS; THE ASSESSMENT COMMITTEE OF THE GREENWICH UNION, RESPONDENTS.

1873
Nov. 19.

Poor-rate—Street Tramways, Rateability of—33 & 34 *Vict. c.* 78, *ss.* 34, 57, 62.

A tramway company, formed under the Tramways Act, 1870 (33 & 34 Vict. c. 78), laid down a tramway in a highway, the soil of which was vested in the district board.

Sect. 34 gives the exclusive use to the company of the tramway for carriages with flange wheels or other wheels suitable only to run on the rail. By s. 57 the company are not to acquire any right other than that of user of any road in which their tramways are laid; and by s. 62 nothing in the Act is to abridge the right of the public to pass along or across every part of any road in which the tramways are laid with carriages not having flange wheels or wheels suitable only to run on the rail; and by s. 25 the rails must be laid level with the road:—

Held, that the company were rateable to the poor-rate in respect of their occupation of the road by their tramways.

CASE stated after notice of appeal under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), to the Court of General Assessment Sessions against a supplemental valuation list for the parish of St. Paul's, Deptford, in which was included the appellants' line of tramway, within that part of the parish which lies within the county of Surrey:—

1. The appellants are a company formed under certain private Acts, with which is incorporated the Tramways Act, 1870 (33 & 34 Vict. c. 78).

2. In pursuance of the above Acts, and subject to their provisions, the appellants formed themselves into a company for the laying down and working certain tramways within the metropolis, and have laid down and now work the tramway situate in the respondents' parish, in respect of which the assessment appealed against was made.

3. The tramway was laid down along a public street or highway in the respondents' parish.

4. Sect. 34 of the Tramways Act, 1870, gives to the promoters of a tramway the exclusive use of the tramway for carriages with flange wheels, or other wheels suitable only to run on the prescribed rail. And s. 54 imposes a penalty of 20*l.* upon persons,

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other than the promoters or those claiming either under them or by licence from the Board of Trade as by the Act provided, who may use the tramway with carriages with flange wheels or other wheels suitable only to run on the prescribed rail.

5. By s. 46 the local authority of the district in which any tramway is laid down has power to make regulations as to the following matters, that is to say:—1. Speed at which the appellants' carriages may travel. 2. The distance between the carriages. 3. The stoppages of carriages using the tramway. 4. The traffic of the road in which the tramway is laid.

6. The promoters are bound by s. 48, and the powers thereunder exercised, to have all the carriages, drivers, and conductors working on their tramway duly licensed. By s. 61 it is enacted: "Nothing in this Act shall limit the powers of the local authority or police in any district to regulate the passage of any traffic along or across any road along or across which any tramways are laid down, and such authority or police may exercise their authority as well on as off the tramway, and with respect as well to the traffic of the promoters or of lessees as to the traffic of other persons." The appellants have been fined by the magistrates for infringement of the police regulations with respect to hackney and other carriages, and the Court of Queen's Bench have confirmed the decision of the magistrate.

7. By s. 57, it is enacted, that the promoters of any tramway shall not acquire or be deemed to acquire any right other than that of user of any road along or across which their tramways are laid; and shall not be exempt from tolls levied on any turnpike road. And by s. 62 it is enacted: "Nothing in this Act or in any bye-law made under this Act shall take away or abridge the right of the public to pass along or across every or any part of any road along or across which any tramway is laid, whether on or off the tramway, with carriages not having flange wheels or wheels suitable only to run on the rail of the tramway."

8. Sects. 29, 30, 31, 32 and 60 preserve the rights of certain public and other authorities to alter and divert the road; and s. 32 further provides that the said authorities shall not be liable to pay the promoters or lessees of any tramway any compensation for injuries done to the tramway by the execution of the work for

which the said section provides, or for loss of traffic occasioned thereby, or for the reasonable exercise of the powers so vested in them as in the section provided.

9. Sect. 35 gives power to the Board of Trade to issue licences (specifying the tolls to be paid by the licensees to the appellants or their lessees) to persons other than the appellants to use the said tramways with flange wheels, where it has been proved to the satisfaction of a referee under the Act that the public are deprived of the full benefit of the tramway.

10. The Court was to have power to draw such inferences of fact as the Court of General Assessment Sessions or a jury would have power to draw.

The question for the opinion of the Court was, whether the appellants are liable to be included in the supplemental valuation list in respect of their tramway.

If the Court should be of opinion in the affirmative, then the question, as to what amount the valuation was to stand at, was to be referred to the determination of the Court of General Assessment Sessions.

H. S. Giffard, Q.C. (with him *Poland*), for the appellants. There is no such exclusive occupation of land as is necessary to make the tramways rateable to the poor-rate. The Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 96, vests the soil of the road in the district board, and the company having a mere user of the tramway, the owners of the soil retained the possession: see the judgment in *Roads* v. *Trumpington* (1) distinguishing *Reg.* v. *Smith.* (2) Sect. 57 of the Tramways Act expressly confines the company's rights to a mere user; while s. 61 leaves all the power over the traffic of the road in the local authority and police; and s. 62 leaves the rights of the public over the road entirely unabridged, and gives them express power to drive along or across the tramways; and with a view to this, s. 25 compels the company to construct the tramway so that the top of the rail shall be on a level with the surface of the road. The company have, therefore, only a right similar to a way-leave, which in *Rex* v. *Jolliffe* (3) was

(1) Law Rep. 6 Q. B. 56, 63. (2) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(3) 2 T. R. 90.

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held not to be a rateable occupation. In *Rex* v. *Bell* (1), a person having similar rights was held rateable, but on grounds which are in the appellants' favour, viz. that he had exclusive occupation of the way to the exclusion of others.

[*Field, Q.C.*, contrà, referred the Court to *Reg.* v. *West Middlesex Waterworks.* (2)]

Sect. 34 will be relied on by the other side, but that only shews that the company have the sole right to run cars with flange wheels, and cannot override s. 57.

[QUAIN, J. Do not the company occupy the piece of land in which the tramway is fixed? And have they not the exclusive use of the vacant space along which the lower part of the flange of the wheel travels? The rails are the property of the company.]

It must be admitted that in a certain sense and for certain purposes the rails are the property of the company, in reversion, on the tramway being discontinued: see s. 41. But s. 57 gives the right of user to the public as long as the tramway is kept laid down. The vacant space is occupied by no one.

[QUAIN, J., referred to *Electric Telegraph Co.* v. *Salford.* (3).

BLACKBURN, J. referred to *Reg.* v. *Train.* (4) Suppose an iron covering to a cellar in a footpath, surely the occupier would be rateable notwithstanding the public user over it.]

The occupier would be rateable in respect of the cellar, but not so clearly as to the top: see the late case of *Hamilton* v. *St. George, Hanover Square.* (5)

[LUSH, J. Pipes, entirely under or entirely out of the ground, are rateable, why not if they were only let into the soil so as to be level with the surface?

BLACKBURN, J. Surely a railway company are rateable for the part of the line over which there is a level crossing.]

That point has never been decided. Sect. 28 treats the tramrails as part of the road; and s. 25 makes it imperative to lay them level with the surface. On the whole, therefore, the company have

(1) 7 T. R. 598.
(2) 1 E. & E. 716; 28 L. J. (M.C.) 135.
(3) 11 Ex. 181; 24 L. J. (M.C.) 146.
(4) 2 B. & S. 640; 31 L. J. (M.C.) 169.
(5) Post, p. 42.

only a right of way, the owner of the road remaining in possession.

Field, Q.C. (*Bullen* with him), for the respondents, was not heard.

BLACKBURN, J. When once we understand the facts of the case, I think there is no difficulty in saying that the company are the occupiers of property rateable under the statute of Elizabeth. I perfectly agree that, in order to be liable to be rated, the parties must be shewn to be in occupation of some portion of the land; but I do not agree in limiting the term land to what is in the popular sense the earthy part, if I may call it so. I think if they are occupiers of land in the sense that they are in the exclusive occupation of any portion of it, whether above or below, they are liable to be rated; but they must be shewn to be occupiers. I also agree with what was decided in the case of *Rex* v. *Jolliffe* (1), that where a person merely enjoys a right to go across land in the sense of a right of way or way-leave, he is not in the occupation of the land and is not rateable. It may be that the actual occupier of the land, if he takes payment, may have his rateable occupation enhanced in consequence of the tolls, or it may be otherwise. But a person who has no more than a mere easement or right to go across land or drive over it would not be an occupier of the land, and would not be rateable. But then, when we come to look at what the present case is, we find this, that under the Tramways Act authority is given to the promoters, under certain conditions which I need not at present enumerate, to lay down along the roadway a tramway, and to make it in such a way that along that tramway there may be run a carriage with wheels having a flange going into a groove or space which keeps it upon the line; and the tramway is laid down solely and entirely for the purpose of facilitating the use of such carriages, with these flanged wheels, along that portion of the ground over which the tramway is made. That being so we have to see, taking the whole Act together and not any one particular part of it, whether the object and intention of what is carried out by the Act is not this, that the promoters, who have laid down the tramway for that purpose, are to have the occupation of that portion of the land upon which they lay the

(1) 2 T. R. 90.

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tramway, so as to make them occupiers of land and liable to be rated. It seems to me, looking at the whole Act, that they are clearly liable for that occupation, the value of which is enhanced not by the carriages which run upon it, or the horses that draw, or anything of that kind, but by the power of carrying on the traffic upon it. It seems to me they are occupiers of land to the same extent and in the same manner as in the cases which are now perfectly well established and of every day occurrence, where a gas company or a waterworks company lay in the road their main pipes, and carry them along the road under the surface of the soil, instead of coming above it, in which, in respect of their pipes, which carry the water from the supply to the place where it is to be distributed, the company are held liable as occupiers of so much of the land as the pipes occupy for the purpose, the beneficial value of which occupation is to be got at, by considering that it facilitates their carrying gas or water from the points of supply to the point of distribution. I am, therefore, of opinion that the promoters of the tramway are occupiers of the land in the same sense that the owners of the pipes are. There is a considerable resemblance between the iron tram metal or artificial tramway here and the pipe which is laid down, though there is this difference undoubtedly, that the pipe—I do not know that it would be absolutely necessary it should be so—is generally buried in the soil some way below the causeway, pavement, or macadamised road, which forms the thing actually supporting the carriages of the public passing along; but I do not think that makes any difference. By s. 34 of the Act, when the tramway is laid down the promoters may use on it carriages with flange wheels, or wheels suitable only to run on the rail prescribed by such Act, and subject to the provisions of such special Act and this Act, the promoters and their lessees shall have the "exclusive use of the tramways for carriages with the flange wheels, or other wheels suitable to run only on the prescribed rail." Clearer words can hardly be used than that for the purpose of saying that the rails are laid down entirely to facilitate that purpose, and for that purpose the promoters shall have the exclusive right of user. The Act proceeds to say after that, in various sections which have been referred to, that, notwithstanding this, the public shall still have all the right of way over the road just

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as if the tramway had not been laid down, and they may drive across it, and may use the rights of road everywhere over it, but they must not use it for the only purpose for which it is laid down. Further, it is so provided that, notwithstanding the tram-rails are laid down, and notwithstanding the promoters are given the exclusive right, yet it shall be considered a road, and they shall be subject to pay tolls if they should happen to pass through a turnpike. These matters do not seem to me in the slightest degree inconsistent with their being occupiers of that land which is de facto occupied by the tramway laid down for a particular purpose, namely, for their benefit, the user of which for that particular purpose is by the terms of the Act given exclusively to them. It seems to me, therefore, they are occupiers and liable to be rated.

LUSH, J. I am of the same opinion. The Act of Parliament enables the proprietors of a tramway to appropriate to their own purpose a given portion of the public road for the purpose of laying down the tram-rails which are requisite for the conveyance of their carriages along the line of road; the tram-rails occupy a portion of the soil, they are exclusively used by the tramway company for the purposes of the tramway, and that I think makes them occupiers of that portion of the soil. I do not think they are the less occupiers because the public still have the right of passing over the surface of their iron road. The road as a tramway is in their exclusive use and used for their exclusive benefit; therefore I agree in thinking they are occupiers, and must be held to be rateable.

QUAIN, J. I am entirely of the same opinion. I am unable to distinguish this case from the cases which have been decided upon the occupation of land by water companies and gas companies. The principle upon which these pipes are rateable is laid down in the case of *Reg.* v. *West Middlesex Waterworks Co.* (1), in these words, by Mr. Justice Wightman, delivering the judgment of the Court: "In this case the first question is, whether the company are rateable for their mains, which are laid under the surface of the highway, without any freehold or leasehold interest in the

(1) 1 E. & B. at p. 720; 28 L. J. (M.C.) at p. 137.

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soil thereof being vested in the company. We think they are. These mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so are, de facto, in possession of the space in the soil which the mains fill for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be de facto merely, and without any legal or equitable estate in the land where the mains lay, by force of some statute." It appears to me that no difference can be pointed out between this tramway and those gas and water mains, except that the gas and water mains are deeper in the soil than this iron tramway. According to the 25th section of the Act, the upper surface of the iron tram-rail must be on a level with the road, therefore there is that difference, that the one is deeper than the other. But I am unable to distinguish the iron tram-rail from the gas and water pipes; both physically occupy the soil; one is somewhat deeper than the other, the tram-rail having the upper surface level with the road; but they both occupy the soil of the road physically and in exactly the same manner. I do not see, either in s. 57 or s. 62, any provision which in any way interferes with that principle; they only preserve the rights of the public to go over the surface as before; but in no way is it stated that those tramways so made, and the baulks of timber upon which they are laid, were part of the road in the sense of being the property of the public authorities; they remained the private property of the tramway company; and they, by means of the iron tram-rails and the baulks of timber, are occupying the soil of the road in the same manner exactly as the gas pipes and water pipes; and the latter being rateable, I think that the former are also rateable.

Judgment for the respondents.

Attorneys for appellants: *Ashurst, Morris & Co.*
Attorney for respondents: *S. Saw, Greenwich.*

[IN THE EXCHEQUER CHAMBER.]

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Nov. 27.

RAMSDEN *v.* LUPTON.

Bill of Sale—Agreement to renew—Substitution of Fresh Bill—Registration— 17 & 18 *Vict. c.* 36.

W., owing 500*l.* to E., and being pressed to give security, an agreement was come to between them and plaintiff that W. should give plaintiff a bill of sale of the furniture in W.'s house, that the bill should be kept renewed for twelve months, and neither the original bill nor the renewals should be registered unless W. should get into difficulties. Accordingly W. executed a bill of sale on the 8th of March, 1872, by which he assigned all the furniture to plaintiff, with a proviso for redemption if the 500*l.* were paid on the 8th of March, 1873, or on any earlier day after twenty-four hours demand in writing; and it was agreed that after default in payment plaintiff might take possession and sell, but in the meantime the goods should remain in W.'s possession. A second bill of sale in similar terms was executed on the 27th of March, 1872; but the first bill remained in plaintiff's possession uncancelled. On the 13th of April plaintiff demanded payment; on the 15th of April W. was in difficulties, and the bill of sale was duly registered on that day under 17 & 18 Vict. c. 36. The goods were afterwards taken in execution at the suit of the defendant, a judgment creditor of W.:—

Held, that, though the transaction might be an evasion of the Bills of Sale Act, there was nothing in that statute to render it illegal; that the substitution of the second bill of sale for the first amounted to a transfer of the goods from the plaintiff to W., and from him to the plaintiff again; so that the property passed by the second bill, which, being registered, was good against the defendant.

Smale v. *Burr* (Law Rep. 8 C. P. 64), affirmed.

APPEAL by the defendant against the decision of the Court of Queen's Bench discharging a rule to set aside the verdict for the plaintiff and to enter a verdict for the defendant, pursuant to leave reserved at the trial.

1. In the month of November, 1871, W. A. Whyte and Henry David Burn carried on business in partnership in the city of London as colonial merchants, under the firm of W. A. Whyte & Co., and were engaged in certain sugar speculations, in which, at the request of Whyte, Wm. Francis Englebach, of the firm of Englebach & Keir, agreed on behalf of his firm to join.

2. The plaintiff was the personal friend and solicitor of Englebach, and the firm of Englebach & Keir agreed with the plaintiff

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to give him one-fifth of their share of profit or loss in this speculation.

3. Whyte & Co. subsequently purchased certain sugars on behalf of themselves and Messrs. Englebach & Keir.

4. On the 8th of January, 1872, Whyte informed Englebach that he had sold the sugars at a profit, the prompt day being the 9th of March, 1872.

5. On the 1st or 2nd of February, 1872, Whyte informed Englebach that he, Whyte, would have to pay the difference between what he could get advanced by his bankers on the sugar and the price at which it had been bought, and asked Englebach to give him a cheque for 500*l.*, which, as Whyte said, would about represent the share of Englebach and his partner Keir in the transaction.

6. Englebach thereupon, on the 2nd of February, gave to Whyte a cheque of his firm for 500*l.* payable to Whyte & Co., which cheque was on the same day paid, and the amount of which was to be repaid on or before the said 9th day of March, 1872.

7. On or about the 8th of March, 1872, account sales were sent by Whyte & Co. to Englebach and Keir, shewing a profit on the resale of the sugar of 39*l.* 12*s.* 11*d.*

8. About the 5th or 6th of March, 1872, Whyte called upon Englebach, and said the money would be due in the ordinary course on the 9th of that month, and asked him to allow the repayment of the 500*l.* to stand over, as he, Whyte, was temporarily pressed for money. Englebach asked for some security, and Whyte stated that he had no security to give except certain furniture in a house occupied by Whyte at Teddington, upon which furniture he suggested a bill of sale should be given.

9. Englebach, after consulting the plaintiff, assented to Whyte's proposal; and as Englebach was desirous that his name should not appear in the bill of sale, it was agreed between Englebach, Whyte, and plaintiff, that the bill of sale should not be registered, and that it should be made in plaintiff's name.

10. It was at the same time also agreed between the three that the bill of sale was to be kept renewed for twelve months, and that neither it nor the renewals were to be registered during that period, unless Whyte should get into difficulties in the meantime.

11. In pursuance of this agreement a bill of sale dated the 8th of March, 1872, was executed by Whyte. It purported to be an indenture between Whyte and the plaintiff, but was executed by Whyte only, by which, after reciting that Whyte, the mortgagor, was indebted to the plaintiff, the mortgagee, in 539*l.*, it was witnessed that in consideration of the said debt and 5*s.* paid by the mortgagee to the mortgagor, the mortgagor assigned to the mortgagee, his executors, &c., all the furniture in a certain dwelling house occupied by the mortgagor, and all his right, title, &c., to hold to him, his executors, &c., as their own property. Provided that if the mortgagor should pay the 539*l.* with interest, on the 8th of March, 1873, to the mortgagee, or at such earlier day as the mortgagee, his executors, &c., should appoint for the payment, by a notice in writing to be given to the mortgagor at least twenty-four hours before the day appointed for payment, then in such case the deed should determine and be absolutely void; and it was declared and agreed that after default by the mortgagor in payment, it should be lawful for the mortgagee, his executors, &c., to take possession and sell the furniture, holding the surplus over debt, interest, and costs in trust for the mortgagor; and that until default in payment it should be lawful for the mortgagor to retain possession of the furniture.

12. On the 27th of March, in further pursuance of the agreement, a fresh bill of sale of that date was executed by Whyte, in the same terms as the first bill of sale with the exception of the dates; but the first bill of sale remained in the possession of the plaintiff uncancelled.

13. On the 13th of April, 1872, a notice in writing demanding payment from Whyte of the sum purporting to be secured by the bill of sale, was served upon him.

14. About the 13th or 15th of April, the plaintiff learnt that Whyte was in real difficulties, a writ having been issued against him, and the bill of sale of the 27th of March was on the 15th of April, 1872, registered in due form under 17 & 18 Vict. c. 36.

15. On the 20th of April, 1872, possession of the furniture, which was the subject of the bill of sale, was taken by the plaintiff; and on the 24th of April, 1872, the sheriff of Middlesex seized the furniture, under a writ of fi. fa. issued at the suit of

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the defendant, upon a judgment obtained by him in the Court of Queen's Bench against Messrs. Whyte & Burn.

16. and 17. An interpleader issue was directed to try whether the furniture was, at the time of the seizure, the property of the plaintiff as against the defendant.

18. At the trial at the sittings after Trinity Term, 1872, before Quain, J., a verdict, on the above facts, was directed for the plaintiff, leave being reserved generally to the defendant to move to enter a verdict for him.

19. In Michaelmas, 1872, a rule was accordingly obtained, on the ground that the bill of sale on which the plaintiff relied was not valid within the Bills of Sale Act as against the execution creditor.

Jan. 24. *Powell, Q.C.*, shewed cause, and relied chiefly on the cases of *Hollingsworth* v. *White* (1), and *Smale* v. *Burr*. (2)

Thesiger, in support of the rule, endeavoured to distinguish those cases, and cited *Ex parte Fisher*. (3)

THE COURT (Cockburn, C.J., Mellor and Quain, JJ.,) discharged the rule, on the ground that *Smale* v. *Burr* (2), a decision of a co-ordinate Court, was not distinguishable, but intimating that, as at present advised, they were not disposed to concur in that judgment.

The question for the opinion of the court of appeal, was whether or not the defendant was entitled to have the verdict entered for him on the said issue.

Nov. 27. *Thesiger, Q.C.* (with him *G. G. Kennedy*), for the defendant, the execution creditor. The Court of Queen's Bench gave judgment for the plaintiff, on the authority of *Smale* v. *Burr*. (2) But they expressed doubts as to that decision; so that it will be as well to see what the law is and what the previous cases have decided. No doubt an assignment of property for a good consideration is not void at common law, or under 13 Eliz. c. 5, s. 6, merely because it is made with the intention to defeat judgment creditors: *Wood* v. *Dixie* (4), *Holbird* v. *Anderson* (5); but

(1) 6 L. T. (N.S.) 604; 10 W. R. 619.
(2) Law Rep. 8 C. P. 64.
(3) Law Rep. 7 Ch. Ap. 636.
(4) 7 Q. B. 892.
(5) 5 T. R. 235.

then the assignment must be for the benefit of the creditor: see per Mellish, L.J., in *Ex parte Cohen* (1). And there is no case which decides that where, as here, a bill of sale is given to evade, and, as it were, commit a fraud upon an Act of Parliament, and so to deceive or defraud creditors, such bill of sale, is good. In *Cundell* v. *Dawson* (2), it was held that a contract which merely omitted the requisites of the Coal Act (1 & 2 Vict. c. ci. s. 3), of delivering, on delivery to the purchaser, a ticket, stating the number and weight of the sacks to be delivered, could not be enforced, as impliedly prohibited by the statute. *Ritchie* v. *Smith* (3) enunciates the principle that an agreement to enable a person to contravene a statute cannot be enforced. By the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, a bill of sale must be registered within twenty-one days of the making, otherwise it will be void and invalid, as against execution creditors, as to all personal chattels comprised in it which remain in the apparent possession of the person making the bill; and by s. 7, personal chattels are to be deemed in the apparent possession of the grantee if they remain on premises belonging to him, although formal possession may have been taken by or given to any other person. The furniture here must be taken to have remained on Whyte's premises, although the plaintiff is said to have taken possession of it before the defendant's execution was put in; the case, therefore, is clearly within the mischief which the Bills of Sale Act was intended to prevent, viz. the obtaining by a debtor of fictitious credit by remaining the apparent owner of goods which he has really parted with; the whole transaction is, therefore, a fraud upon the Act, and void, although the second bill was registered. In *Stansfeld* v. *Cubitt* (4) the transaction was precisely similar to the present, and the Vice-Chancellor held the transaction fraudulent and void, as against assignees in bankruptcy of the grantor, and also that no presumption could be made in favour of the cancellation of the previous deeds; and in the present case it is expressly stated that the first deed remained in the possession of the plaintiff uncancelled. On appeal the Lords Justices affirmed the decision, but on the ground that (5), assuming

(1) Law Rep. 7 Ch. Ap., at p. 23.
(2) 4 C. B. 376; 17 L. J. (C. P.) 311.
(3) 6 C. B. 462; 18 L. J. (C. P.) 9.
(4) 27 L. J. (Ch.) at p. 268, n.
(5) 2 De G. & J. 222; 27 L. J. (Ch.) 266.

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the property to have passed by the last bill of sale which was registered, the transaction was not a bonâ fide conveyance, and was therefore not protected under s. 133 of the Bankruptcy Act, 1849, and was therefore void as against the assignees. The second objection is, that no property passed under the second bill of sale, as the absolute property in the goods was conveyed under the first bill, and the first bill remained in the plaintiff's possession uncancelled. On this point, besides the case of *Smale* v. *Burr* (1), *Ex parte Harris* (2) will be relied on for the plaintiff; but in that case there was fresh consideration for the new bill of sale, and the case was decided on this point on the authority of *Hollingsworth* v. *White* (3), in which, also, there had been fresh dealings between the parties; both those cases are, therefore, distinguishable from the present. Lastly, as to the case of *Smale* v. *Burr* (1), on the authority of which the Court of Queen's Bench proceeded, though expressing doubts; that case, it must be conceded, is directly in point, except that there the jury had found the bona fides of the transaction. Here, there can be no doubt that the arrangement from the first was made with the express intention of evading the statute; and in *Ex parte Cohen* (4), where the point, no doubt, was whether the last of a series of bills of sale like the present was invalid as an act of bankruptcy, James, L.J., after holding in the affirmative, proceeds: "Then it was said that though the security was for a past debt, it could be supported by reason of a prior agreement made between the parties. But that agreement was evidently concocted for the purpose of evading, if possible, the remedy which the Act as to bills of sale intended to provide for the benefit of creditors. This attempt at fraud does not, in my opinion, strengthen the position of those who rely upon it to support the assignment. To hold that such an assignment would stand would be a direct encouragement to fraud." And Mellish, L.J., said: "I think that this does not come within the cases cited, where a bill of sale is upon an advance agreed to be given, and is afterwards given, in which case it has been held to relate back to the time of the advance. In all those cases the agreement to give the bills of sale was binding on

(1) Law Rep. 8 C. P. 64.
(2) Law Rep. 8 Ch. Ap. 48.
(3) 6 L. T. (N.S.) 604; 10 W. R. 619.
(4) Law Rep. 7 Ch. Ap. 20, 23.

the debtor for the benefit of the creditor; but it is obvious that this debtor did not agree to give a fresh bill of sale for the benefit of the creditor. On the contrary, it is a device between them for the benefit of the debtor, to enable him to avoid that registration which the Act of Parliament has required. Such a consideration ought not to prevent the application of the ordinary rule, that a conveyance of all a man's property for a past debt is an act of bankruptcy. On the contrary, it aggravates the case, as indicating actual fraud." In *Ex parte Fisher* (1), Mellish, L.J., in delivering the judgment of the Court, again expresses himself to the same effect: "Although we do not dispute the rule, that when a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions when the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." These dicta are precisely in point in the present case, and justify the doubt the judges, both of the Common Pleas and Queen's Bench, had on the matter; and it is to be observed that neither of those cases was cited in *Smale* v. *Burr* (2), the only case relied upon being *Hollingsworth* v. *White* (3), which is distinguishable on the ground already mentioned.

Powell, Q.C. (*J. O. Griffits* with him), for the plaintiff, contended that, as it appeared from paragraph 15 that the plaintiff had taken actual possession of the furniture before the execution was put in, the case was really not within the Bills of Sale Act, and it was, therefore, immaterial under which bill of sale the property passed to the plaintiff.

The Court, however, said that it must be taken that the furniture remained in the apparent possession of Whyte, the grantor, notwithstanding it was said that the plaintiff had taken possession: but after some discussion, they intimated that it was unnecessary to hear counsel for the plaintiff further on the other points.

(1) Law Rep. 7 Ch. Ap. 636, 644. (2) Law Rep. 8 C. P. 64.
(3) 6 L. T. (N.S.) 604; 10 W. R. 619.

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COLERIDGE, C.J. I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. At the trial of this interpleader issue, the question apppears to have been reserved shortly whether the plaintiff or the defendant, who was the execution creditor, was entitled to the verdict; the plaintiff having got the verdict, and the Court of Queen's Bench having affirmed that finding, the case is brought before us by way of appeal, to say whether that finding should or should not be reversed.

The facts, as I understand them, are these:—Some little time before the giving of the last bill of sale there had been an agreement between Mr. Englebach, Mr. Whyte, and the plaintiff that there should be a bill of sale given, that the bill of sale should not be registered, and that it should be made in the plaintiff's name, that it should be renewed from time to time during twelve months, and that neither the original bill of sale nor the renewals should be registered during that time, unless Mr. Whyte should get into difficulties; but each renewal bill, as I understand the facts of the case, being capable at any moment of being registered and being made effective, if the circumstances of Mr. Whyte made it, in the opinion of the plaintiff, desirable that the bill of sale should be registered. Mr. Whyte did get into difficulties; and the second bill of sale, upon which the present question arises, was registered within twenty-one days, so as to be valid under the Bills of Sale Act, unless the objection raised can prevail.

Now what is the objection raised? As I understand Mr. Thesiger, it is said that that must be taken to be an illegal proceeding altogether; the arrangement was a fraud—as he expressed it—upon the Act of Parliament: that the arrangement overran the whole transaction; that the bill of sale really and truly, which was registered, was a part of a transaction which ab initio had been illegal, and is, therefore, a transaction to which no court would give effect, because it had no legal foundation from the beginning.

It is rather difficult to put into any other form what exactly is meant by an arrangement that is a fraud upon an Act of Parliament of this sort. I perfectly understand the expression, and it may be a very legitimate one to use with regard to the bankruptcy laws which are passed for different purposes, and an attempt to

evade which, while complying with the letter of the statute, has been held by the courts, and has repeatedly been decided, to be, not a successful evasion of the statute, but such a colourable attempt to evade the statute as the Court would describe as a fraud upon it. But, in the present case, we have only to deal with the enactment of the Bills of Sale Act, which enacts that a bill of sale, which purports to do what this purports to do, shall be registered within twenty-one days after it has been given; otherwise, as against certain persons, including, as it is admitted, the defendant in this action, it is to be null and void to all intents and purposes whatever. But the Bills of Sale Act enacts impliedly that if any bill of sale, purporting to do what this purports to do, is registered within the time limited by the Act, then as against all persons, including such a person as the defendant, it shall be perfectly valid and effective to all intents and purposes whatsoever.

Now, here we have a bill of sale, perfectly good on its face, registered in good time, and the words, therefore, of the Act of Parliament have been complied with. But it is said, nevertheless, that the mischief intended to be prevented by the Act of Parliament has not been prevented, and that, therefore, this bill of sale is void, and that the registration of it is of no avail. If the terms of the Act of Parliament had been contravened, I can perfectly understand that any arrangement intended in contravention of the Act of Parliament would be illegal; but if the terms of the Act of Parliament have been observed, all we can say is, that if transactions of this kind, not forbidden by the Act of Parliament, are nevertheless thought by Parliament to be contrary to public policy, they must pass an Act making such a thing illegal. In an arrangement by which a series of bills of sale shall be given always with the power from time to time of making any one of them effective, I am unable to see that there is any contravention of the Act of Parliament, or anything to make such an agreement illegal ab initio.

Then it has been suggested that there are cases in Chancery, the judges deciding which have expressed opinions that such a series of bills of sale as this would be what they call void and illegal, and that a bill of sale properly registered at the conclusion of such a

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series of transactions would be invalid. But I think if the matter is looked into it will be found that those cases are not at all ad rem. The judges are there deciding a totally different point. They are deciding a matter as to which the cases are very properly decided, and from the decision of which cases rightly regarded certainly I, for one, and I think no member of the Court is disposed to express the slightest dissent.

Stansfeld v. *Cubitt* (1) and *Ex parte Cohen* (2), were both cases under the Bankruptcy Acts; and it was held, in the one case, that the last of a series of renewals of bills of sale of this description was invalid after a previous act of bankruptcy. And in the other case the Lords Justices held, that where for the purpose of evading the operation of the bankruptcy laws a person, who had executed a series of bills of sale unregistered, allows the last bill of sale to be registered for the very purpose of delaying and defeating creditors and evading the bankruptcy laws, that would be invalid as an act of bankruptcy. From that kind of decision, upon such principles, no member of the Court is inclined to dissent.

But this is a totally different matter, and the question really before us is, whether the case of *Smale* v. *Burr* (3), from which this in substance is an appeal, was rightly decided. I am of opinion that that case was perfectly rightly decided. It seems to me that the late Lord Chief Justice of the Common Pleas put the matter upon the right legal footing, when he said that there was originally a good consideration, that the good consideration ran through and supported the different bills of sale, that as between the assignor and the assignee, at least, the effect of giving each bill of sale was to annul and cancel the bill of sale that stood earlier in the series; that the last bill of sale, having been a good bill of sale upon the ground of consideration having been given which supported it, in common with all the rest, was a perfectly good bill of sale if registered. And that, having been registered within the time, this last bill of sale was a good bill of sale, that it passed the property, and the plaintiff was entitled to retain the verdict.

The only matter upon which I think it necessary to say a single

(1) 2 De G. & J. 222; 27 L. J. (Ch.) 266.

(2) Law Rep. 7 Ch. Ap. 20.

(3) Law Rep. 8 C. P. 64, 67.

word is this: It is found (in par. 12) that the first bill of sale remained in the possession of the plaintiff uncancelled; and we are called upon to express some opinion upon what effect that statement is to have. Looked at by the light of the other facts of the case, I must construe that as meaning to say that in point of fact it was uncancelled, unless the effect of the giving of the subsequent bill of sale had the effect of cancelling it in point of law. The case of *Smale* v. *Burr* (1) decided that that was the true effect of a succession of bills of sale given in this way. I am of opinion that that is the true legal construction to be placed upon facts such as these; and that the statement in this case must be read by the legal gloss fixed to it by the Chief Justice and by the other judges of the Common Pleas.

I abstain from saying whether I decide this case with regret or otherwise. I have only to say, sitting as a judge, that the facts of the case bring out a certain legal conclusion. If that legal conclusion is a conclusion displeasing to general sense and understanding, it is for some other tribunal, and not for a court of law to correct it. A court of law has merely to express the legal conclusions upon the facts of the case found before it, and upon the authorities which are brought forward on the one side and on the other.

With regard to the point Mr. Powell made on paragraph 15 of the case, I think it is enough to say that, if that point had really arisen, the case would not have come here at all, because it would have been beyond the Bills of Sale Act altogether. It would have been a question of fact which would have been properly left to the jury; and if the fact had been that the furniture had been taken possession of physically and manually by the assignee of the bill of sale, in such a manner as that the apparent possession had terminated four days before the execution creditor entered, this question could not have arisen at all. Therefore, I think it enough to say that we must read that finding in the case by the light of common sense, and we must assume that it did not mean to find any such termination of the apparent possession of the owner as would take the case out of the definition of the term which is found in the last paragraph of s. 7 of the Bills of Sale Act.

(1) Law Rep. 8 C. P. 64.

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BRAMWELL, B. I am also of opinion that the judgment of the Court of Queen's Bench must be affirmed. It is manifest that there was nothing illegal in the agreement made between the plaintiff, on behalf of Mr. Englebach, and Whyte, the borrower of the money. There is nothing in the Bills of Sale Act which prohibits what was done and agreed between these parties. There is nothing in the statute that prohibits or enjoins anything. It only says unless certain things happen certain consequences shall follow. That being the case, it is impossible to make out this transaction to be illegal. Then the suggestion is, "Well, but it is contrary to the policy and spirit of the Act." But if there are no enjoining or prohibitory clauses in the Act, I do not see how it can be said that one must examine whether it is contrary to the policy and spirit of the Act. No doubt, to a certain extent, the Act may be evaded; but, as it has been observed, an Act evaded is an Act not broken. I am clearly of opinion that there is nothing in any sense illegal in this transaction, and that it was not within the Act of Parliament in such sense that the non-registration of the first bill of sale and the agreement, taken altogether, rendered the parties to it subject to the consequences which, as pointed out in the Act of Parliament, are to take place where a bill of sale is not registered when it ought to be registered.

The only question, then, to my mind is that which has been raised, whether the plaintiff's true title is under the first bill of sale, which is not registered, so that he has no title under the second bill of sale, which is registered. That seems to be the only question that can arise. On this we have the authority of two courts, the Common Pleas and the Queen's Bench; for in the case of *Hollingsworth* v. *White* (1) the Lord Chief Justice said that the effect of what took place was a virtual cancellation of the first deed. It really matters very little, if one gets to the substance of a thing, what words one uses, but I should not use precisely those words. I should be much more inclined to say that the true title of the plaintiff was that, but for the second bill of sale, he might rely on the first; but, at all events, he may rely on the second by way of estoppel against the grantor. I incline to think that is the right way of putting it, and that it is so seems to me abundantly mani-

(1) 6 L. T. (N.S.) 604; 10 W. R. 619.

fest. Let us suppose a case where there is no suspicion of what is called fraud on the statute, no evasion of anything, but the most honest case that can be possible. Let us suppose the case of there being no bargain not to register the bill of sale, but by some mistake it has not been registered within the twenty-one days, and that thereupon the lender of the money goes to the debtor and says, "Oblige me by executing another bill of sale, that I may register it in time," and the debtor does it; is it supposable that the grantee of the second bill of sale must go through the form of either handing the goods back to the assignor as a gift, or selling them to him for five shillings, or some other contrivance of that sort, so as to give a title back to himself? I have no doubt there can be no necessity for that, and that this second bill of sale, consequently, is effectual either to give him a true title or to give him such a title that it operates by estoppel against the grantor.

Then the only other question is what I must characterise as a trifling difficulty, but still entitled to every respect, which is, that it was not intended by this second instrument to pass the property. If that is to be dealt with in any way, my notion is that they probably never thought of anything so recondite as that which has been suggested; but they did think that every one of these instruments would pass the property. I think they executed these successive instruments with that intention, and what they intended was, that the original instrument was to be given up on the execution of the other. I may make this remark, however, by the way, as a warning to people who try these experiments,—for there is no doubt they are contrivances,—that a difficulty may arise if they do not stamp the bills of sale, because, if they do not stamp them they cannot be referred to, and then you will have an unexplained bill of sale. However, that is not the question that arises here. I am satisfied that the plaintiff is entitled to our judgment, and that the judgment of the Queen's Bench should be affirmed.

KEATING, J. I am entirely of the same opinion. There is here a good bill of sale upon the face of it, registered in time, and which, if it stood alone, would clearly give title to the plaintiff as against the defendant.

But it is said that the bill of sale, although good upon the face

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of it, is really not valid, because the goods included in it were formally transferred to the same assignee by a previous bill of sale which was not registered. Now there are two ways of looking at that. First, if there were a regular proceeding by which the original transfer was got rid of, the goods re-transferred to the assignor and again assigned by the bill of sale in question, why then I presume there would be no doubt that that would be a transaction that would vest the goods in the present plaintiff. Well, the view taken by the Court of Common Pleas, by the late Lord Chief Justice, and the other judges in the case of *Smale* v. *Burr* (1), was that in effect the giving of the second bill of sale had that operation in point of law, that is to say, that it had the effect of annulling the first bill of sale sufficiently for the purpose of vesting the goods under the second bill of sale. That seems to be the good sense of the transaction and, as my Brother Bramwell has said, without going through an unnecessary form.

But it is said that, although if that took place without any previous agreement, the effect might be that suggested, still, as it has taken place in pursuance of an original agreement that the bills of sale to be given should not be registered, except there was a necessity for doing so, that renders the transaction so far inoperative as to prevent the second bill of sale from passing the property. Now I confess I am unable to see why that which would otherwise take effect should be at all prevented in its effect by the existence of that agreement, unless that agreement were illegal.

The cases cited by Mr. Thesiger might have been in point if the Bills of Sale Act had provided that the bills of sale should be registered within twenty-one days, with a penalty for not doing so. If that were the enactment the Act would have been infringed, —not evaded, but infringed,—by the non-registration; and an agreement to carry out such an arrangement would clearly be an illegal agreement. But the Bills of Sale Act, as has already been pointed out by my Lord and my Brother Bramwell, contains no such provisions. That being so, I am at a loss to discover how in this case it is at all an illegal agreement. I can perceive that it is undoubtedly a mode of escaping from revenue burdens. As such it is not at all to be commended; and, as my Brother Bramwell

(1) Law Rep. 8 C. P. 64.

has pointed out, the parties who do enter upon such arrangements must look out for difficulties which may arise.

Upon the whole it seems to me that the judgment of the Court of Queen's Bench was correct, although undoubtedly the judges did not seem to concur with the opinion expressed by the Court of Common Pleas in *Smale* v. *Burr* (1), which, for my own part, I think was a right decision.

CLEASBY, B. I believe I am the only member of the Court entertaining any serious doubt in this case; but I have done so up to the close of the argument, and I cannot say that it is entirely removed.

I do not at all dissent from the view taken by the rest of the Court upon the general question of the legality of the agreement to renew the bills of sale every twenty-one days, and not to register unless there were unfavourable reports of the debtor. I think this cannot be properly said to be in contravention of the Bills of Sale Act, because the creditors are still protected against unregistered bills of sale, which is all the Act gives them. It enables the debtor, no doubt, to continue with his apparent property the subject of unregistered bills of sale, but that is all, and there is not enough in the Act to forbid that or make it illegal. The Act only exposes such bills of sale to a certain defeasance.

But my difficulty has arisen upon the particular facts of this case, which it is right to consider carefully, when we are dealing with the effect of an agreement so unusual and irregular as the present, which is well described by Lord Justice Mellish, in *Ex parte Cohen* (2), as being, not an agreement to give a fresh bill of sale for the benefit of the creditor, but as a device to enable the debtor to avoid the registration required by the Act.

The first bill of sale passes the property in the goods absolutely, subject only to the power of redemption: *Maugham* v. *Sharpe.* (3) I do not at all question that fresh transactions might be entered into, by which new bills of sale might be substituted for former ones upon a fresh advance of money, or indeed any arrangement by which the old bill of sale was given up or cancelled and a fresh

(1) Law Rep. 8 C. P. 64.
(2) Law Rep. 7 Ch. Ap. at p. 23.
(3) 17 C. B. (N.S.) 443; 34 L. J. (C.P.) 19.

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one given. Such a dealing might fairly be regarded as an exercise of the power of redemption, and so the property would pass by the second bill of sale, the first bill of sale having ceased to be operative. This appears to have been the view taken in the case of *Hollingsworth* v. *White*. (1)

My difficulty is that in the present case there seems to have been no new transaction at all, but only a keeping alive of the old transaction. This is the proper conclusion from the statement in the case, that the first bill of sale remained in the possession of the plaintiff uncancelled, bearing in mind that it might be of consequence to retain the title conferred by the earliest bill of sale. And the argument of the learned counsel for the plaintiff warrants this conclusion, for he relied mainly upon the fact of possession having been taken so as to take the goods out of the apparent possession of the debtor, and so the non-registration of the first bill of sale was immaterial.

If it was made out that such possession was taken before the execution as to make the Bills of Sale Act inapplicable, the plaintiff would clearly be entitled to judgment. And some reference was made in the argument as to the construction to be put upon the words "apparent possession" by the interpretation clause of the Act; but the Court thought that sufficient did not appear to justify the conclusion that the registration was immaterial. If that be so, then my difficulty is in seeing how, as long as the first bill of sale was operative, any title to the goods could pass by the second or subsequent bills of sale to the plaintiff, the debtor having no property in the goods to transfer.

The facts of the case of *Richards* v. *James* (2) were different, and that case does not remove my difficulty which is, however, not sufficient to make me dissent from the judgment which all the other members of the Court think the proper one.

GROVE, J. I am of the same opinion. I agree with Mr. Thesiger that this is an evasion of the statute in the popular sense, in the ordinary sense in which those words are used; that is to say, it is getting away from the remedial operation of the statute while com-

(1) 6 L. T (N.S.) 604; 10 W. R. 619.

(2) Law Rep. 2 Q. B. 285.

plying with the words of the statute; but I think it is a successful evasion. I cannot, however, find anything in this case which at all produces an impression on my mind that this last of a series of bills of sale, when registered, has complied, not only with the terms, but with the particular object there intended, which was to have bills of sale so attainable to the public that they might know that a person had executed such and such a bill of sale. No doubt the mischief intended to be remedied might go much further. As I thought in the case of *Smale* v. *Burr* (1), I cannot help thinking that in that sense the statute has been evaded; the mischief the statute intended to remedy has been produced, or was capable of being produced, while the words of the statute are complied with, and there is no actual disobedience to it. That is saying, in effect, that the statute has not provided a full and adequate remedy for the mischief it intended to remedy. That, of course, is a matter for the Legislature, not for us; and therefore I am confirmed in the opinion which I was reluctant in coming to, that the judgment we were giving in *Smale* v. *Burr* (1) was right.

DENMAN, J. I am of the same opinion. The only words I would retract in the very short judgment which I delivered in the case of *Smale* v. *Burr* (1), are the expressions of regret I then uttered, inasmuch as it was not any part of my duty as judge to express regret one way or another. The statute does not help the defendant, and the plaintiff is entitled to our judgment.

POLLOCK, B. I agree that the judgment of the Court of Queen's Bench ought to be affirmed.

Judgment affirmed.

Attorney for plaintiff: *H. Ramsden.*
Attorneys for defendant: *Phillips & Son.*

(1) Law Rep. 8 C. P. 64.

1873
Nov. 11.

RICHARDSON *v.* SILVESTER.

Practice—Particulars of Claim—Cause of Action for Deceit—Fraudulent Representation—Nonsuit in a County Court.

The particulars of the plaintiff's claim, in an action in a county court, were as follows. "The plaintiff sues the defendant in tort for legal fraud and deceit committed under the following circumstances: for that the defendant, in March, 1872, caused to be inserted in a public newspaper an advertisement for the letting by tender, with immediate possession, of a farm; and the plaintiff, believing in the bona fides of such advertisement, and desiring to become tenant of a place of the description advertised, did take trouble and pains and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of becoming tenant thereof, whereas afterwards it appeared that the defendant had no power to let the property as advertised, and caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement. And that the defendant knew, at the time he caused such advertisement to be published, that he had not the power to let the farm, and that the farm was not to be let." The county court judge ruled that the particulars disclosed no cause of action and nonsuited the plaintiff:—

Held, that the particulars contained allegations amounting to a fraudulent representation, for which an action would lie.

Appeal from the County Court of Montgomeryshire, held at Machynlleth.

This was an action of tort, and the particulars of the plaintiff's claim were as follows:—The plaintiff sues the defendant in tort for legal fraud and deceit, committed under the following circumstances: for that the defendant, in or about March, 1872, caused to be inserted in a public newspaper, called the *Cambrian News*, an advertisement for the letting by tender, with immediate possession, of all that farm, mansion house and mill, called Dolangwyn, situate in the parish of Fowyn, in the county of Merioneth, containing 400 acres (more or less), together with an extensive sheep-walk or mountain pasture carrying 1000 sheep. And the plaintiff, believing in the bona fides of such advertisement and desiring to become tenant of a place of the description advertised, was induced to take and did take considerable trouble and pains, and incurred considerable costs and expenses in going to and inspecting the property, and in the employment of persons to inspect and value it for him with a view to his becoming tenant thereof, whereas it afterwards appeared that the defendant had no power to let the

property as advertised, and caused the advertisement to be issued to serve some purpose of his own, other than that appearing by the advertisement. And the plaintiff claims for damages 50*l*.

The action came on for trial on the 27th of February, 1873. Neither party demanded a jury.

The plaintiff applied to have the particulars amended by inserting the words, "The defendant knew, at the time he caused such advertisement to be published, that he had not power to let the said farm, and the said farm was not to be let."

The Judge was of opinion that the particulars filed did not disclose, and if amended in the manner required by the plaintiff would not disclose, a good cause of action, and directed that the plaintiff should be nonsuited.

The question for the opinion of the Court was, whether the particulars filed disclose, or whether, if amended in the manner required by the plaintiff, they would disclose a good cause of action.

Lopes, Q.C., for the plaintiff. The particulars disclose a cause of action. The action is brought for legal fraud and deceit. The particulars with the amendment shew that the defendant has stated as a matter of fact that which is untrue, knowing it to be untrue, intending that the plaintiff, as one of the public, should act upon it, and he, having acted upon it, has sustained damage. There are, therefore, both a wrong and a loss, for which an action lies: *Gerhard* v. *Bates*. (1) Even without the amendment the concluding sentence of the particulars shews mala fides in the defendant sufficient to sustain the action. The judge was wrong in nonsuiting the plaintiff; he ought to have heard the evidence.

Pritchard, for the defendant. The particulars, either with or without the proposed amendment, shew no cause of action. The particulars do not allege that the advertisement was fraudulently inserted with intent to injure the plaintiff. It is a mere declaration of the defendant's intention to sell the property, for which no action lies: *Harris* v. *Nickerson*. (2)

Lopes, Q.C., was not heard in reply.

BLACKBURN, J. I think the judge was wrong in nonsuiting the

(1) 2 E. & B. 476; 22 L. J. (Q.B.) 364. (2) Law Rep. 8 Q.B. 286.

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plaintiff. The question is not whether there was sufficient evidence to support an action for a false representation,—that would appear when the evidence was heard,—but whether, upon the allegations contained in the particulars, there was a cause of action. If the particulars disclose no cause of action, or it appears, from the opening statement of the plaintiff's advocate, that there was no cause of action, no judge would be bound to hear the facts proved, and he would in such case act rightly in nonsuiting the plaintiff; but if what is assigned as a cause of action might be a cause of action, then the judge ought to hear the evidence and see if the cause of action can be proved. I think, in the present case, on the face of the particulars, especially when amended as proposed, a cause of action was disclosed. It must be taken upon the statement of the plaintiff that the advertisement was issued with some indirect motive, and that the farm was not to be let. This amounts to a false representation. It was a false statement knowingly made and published in order to be read by persons who would be likely to be tenants of farms, and the natural consequence would be that a person who was desirous of becoming a tenant would, upon reading the advertisement, incur expense in looking at the farm. This, it is alleged, is what the plaintiff did. It must also be taken that this was a representation made to the plaintiff. In *Swift* v. *Winterbotham* (1) it is said, in the judgment of the Court, "It is now well established that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby." According to the law so laid down, the advertisement must be read as if the representation was made to the plaintiff. Then, if there is a false representation knowingly made to the plaintiff, and he acts on it and is injured, he has a cause of action. That was decided in *Gerhard* v. *Bates*. (2) The cases of *Barley* v. *Wal-*

(1) Law Rep. 8 Q. B. at p. 253. (2) 2 E. & B. 468; 22 L. J. (Q. B.) 364.

ford (1), and *Evans* v. *Collins* (2), are also authorities to the same effect. In the last case the judgment of the Court of Queen's Bench was reversed, and the law was settled that a mere misrepresentation, untrue in fact, but honestly made, would give no cause of action. In the present case the allegation is, that it was a false representation to the knowledge of the party making it, and I think the judge was premature in directing a nonsuit.

QUAIN, J. I am of the same opinion. I think the case should go back to the county court judge to be heard upon its merits. I do not say for a moment that a county court judge is not justified in strictness in taking the course which was taken in this case, namely, to nonsuit upon the opening; but that is a course which I venture to think, in a court where there are no written pleadings, should not be adopted, except in very plain cases, because, should he be wrong upon the opening, the result is that there will be two trials, when it might have been decided upon the real merits of the case once for all. I think the particulars disclose a cause of action, which ought to have been heard on the merits. They in effect allege that the plaintiff falsely, and well knowing he had no authority to sell the farm, represented that he had, and published an advertisement to that effect. It is quite clear that all persons who were likely to take a farm, or might be reasonably contemplating taking a farm, acting upon that advertisement, and incurring expense in consequence of that false representation, have a remedy by action for deceit. It appears to me that the particulars and the amendment do disclose a cause of action for deceit; and under such circumstances I think the judge ought to have heard the case, and the case should be sent back to him to be further heard.

ARCHIBALD, J., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Jones, Blaxland, & Son.*
Attorney for defendant: *J. Needham.*

(1) 9 Q. B. 197. (2) 5 Q. B. 804.

1873
Nov. 15.

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF ST. GEORGE'S UNION, RESPONDENTS; THE GUARDIANS OF ST. OLAVE'S UNION, APPELLANTS.

Poor—Removal—Irremoveability by Residence—11 & 12 *Vict. c.* 111, *s.* 1.

A woman nineteen years of age, unemancipated, having no other settlement than that of her mother, who was a widow, resided for two years in the respondent union. She then became chargeable, and was removed to her mother's place of settlement:—

Held, that being unemancipated, and not having gained a settlement in her own right, the woman was removeable by virtue of 11 & 12 Vict. c. 111, s. 1, although she had resided more than a year in the respondent union.

UPON an appeal to the Middlesex quarter sessions against an order of justices for the removal of Harriett Hill from Saint George's Union, Westminster, to Saint Olave's Union, the sessions confirmed the order, subject to the opinion of the Court on the following case:—

1. The only question is, whether Harriett Hill is irremoveable from the respondent union by reason of the provision of 9 & 10 Vict. c. 66 (1), and the Acts amending the same, it being admitted by the appellant union that she has legal settlement by parentage in the parish of Rotherhithe, in their union.

2. At the date of the order of removal Harriett Hill was a spinster, and nineteen years old, and at that time she had been an inmate in the workhouse of the respondent union for about a year (through illness which the justices making the order certified will produce permanent disability), having been admitted there on the 21st of January, 1871.

3. Before such admission to the workhouse of the respondent

(1) 9 & 10 Vict. c. 66, s. 1:—No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years [now one year, by 28 & 29 Vict. c. 79, s. 8] next before the application for the warrant. . . . By 11 & 12 Vict. c. 111, after reciting the 9 & 10 Vict. c. 66, s. 1, at length, it is provided that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act.

union Harriett Hill had been residing as a domestic servant at 43, Sutherland Street, Pimlico, in the respondent union, for a little more than two years, having gone into such service on or about the 11th of January, 1869. Before going to the school hereinafter mentioned she was living with her mother in the workhouse of the appellant union.

4. The father of Harriett Hill died upwards of twelve years ago, but her mother is living, and is now an inmate of one of the workhouses of the appellant union. She was for about ten years after her husband's death an inmate of the workhouse of the parish of Rotherhithe, and on the annexation of that parish to the appellant union about two years ago, she became, and has since continued, an inmate of the Saint Olave's Workhouse of the appellant union.

5. Before Harriett Hill entered the service above mentioned she had been for about eight years an inmate of, and educated at, the South Metropolitan District Pauper Schools, situate at Sutton, in the county of Surrey, and maintained therein at the charge of the parish of Rotherhithe, she being a settled pauper thereof as before mentioned. During the two years she had been in service in Sutherland Street as above mentioned she had gained her own living entirely independently of her mother or of any assistance from the parish. She has the same settlement as her mother, as she has never gained a settlement in her own right.

6. The appellants do not admit that "emancipation," whatever its precise meaning may be in reference to the law of settlement, supplies any test for the purpose of the law of irremoveability. It is, however, admitted that the pauper is unemancipated to the extent that any change of her mother's settlement up to the time of the making of the order in this case would have caused a change of her settlement also.

7. The appellants contended that by reason of such residence for two years in Sutherland Street, in the respondent union, as above stated, Harriett Hill, at the date of the order of removal, had acquired the status of irremoveability in such union, and that therefore such order of removal was invalid.

The respondents contended that Harriet Hill being an unemancipated child, and having no other settlement than that of her

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mother, was removeable to the place of her settlement, although she had lived for more than a year in the respondent union, and that such order was, under the circumstances stated, valid.

The question for the opinion of the Court was whether, at the date of the order of removal, Harriet Hill was removeable from the respondent union to her place of settlement.

Sir J. B. Karslake, Q.C., and *Poland*, for the respondents. The question turns upon s. 1 of 9 & 10 Vict. c. 66, and the proviso contained in 11 & 12 Vict. c. 111, s. 1. The pauper has the same settlement as her mother. The father being dead, and her mother being the head of the family, she resides two years in the respondents' union, and then becomes chargeable: she is removeable to the place of her mother's settlement, which is her settlement, because the mother is removeable. The case is distinctly within the proviso of 11 & 12 Vict. c. 111: *Reg.* v. *St. George-in-the-East* (1), and *Reg.* v. *St. Mary, Islington.* (2)

G. Tayler, for the appellants. The question, no doubt, turns on the words of the proviso in 11 & 12 Vict. c. 111: "Any person having a wife and children," means a person whose removal is under consideration. Here the pauper having resided two years in the respondents' union, has acquired a status of irremoveability, and cannot be removed. The object of the statute is to keep a family together; but if settlement and irremoveability are not the same, a child might be sent to its mother's settlement, although the mother was irremoveable: *Reg.* v. *St. George-in-the-East* (1) is in the appellants' favour. There it was decided that the wife was to take her individual status; so here the pauper is to have her individual status, which she has acquired by residence. If a child can gain a settlement, so it can acquire a status of irremoveability. The order is bad.

QUAIN, J. I am of opinion that the order ought to be affirmed. It is admitted in the statement of the case that the pauper has the same settlement as her mother, as she has never gained a settlement in her own right. It is argued that though the pauper has acquired no settlement, and her mother's settlement is her place of settle-

(1) Law Rep. 5 Q. B. 364. (2) Law Rep. 5 Q. B. 445.

ment, she has acquired a status of irremoveability. Although under s. 1 of 9 & 10 Vict. c. 66 the pauper may have acquired a status of irremoveability, that statute must be read with the proviso contained in 11 & 12 Vict. c. 111, which applies exactly to this case. The effect is that, in the case of an unemancipated child, the Act leaves the child in the same position as if the former Act never had been passed. I agree with the observations of my Brother Blackburn in *Reg.* v. *St. George-in-the-East* (1); he remarks, "The whole sentence must be taken together, and grammatically, the words must apply to a wife as well as children; and so reading them, the Legislature in the enactment and proviso would seem to say this: In establishing the status of irremoveability, we leave the common law principle untouched, that husband and wife shall not be separated; and, therefore, where the husband has a settlement, and is removeable, the wife, though she has resided sufficiently long to have become irremoveable, shall be removed with him; and, vice versâ, if the husband is irremoveable, neither shall the wife be removed." So the child can be removed to its father's or mother's place of settlement, and the case does not fall within the enacting section but within the proviso. The order, therefore, is valid.

ARCHIBALD, J. It appears to me that the object of the Legislature was to prevent the separation of parents and children. This case falls within the proviso contained in 11 & 12 Vict. c. 111, s. 1. Whether a child is removeable, depends upon whether the parent is removeable. The order is good.

Judgment for the respondents.

Attorney for appellants: *Wellborne.*
Attorneys for respondents: *Nicholson & Herbert.*

(1) Law Rep. 5 Q. B. at p. 368.

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HAMILTON, APPELLANT; THE VESTRY OF THE PARISH OF ST. GEORGE, HANOVER SQUARE, RESPONDENTS.

Metropolis Local Management Act (18 & 19 *Vict. c.* 120), *ss.* 96, 102—*Cellars under Streets to be repaired by Owners.*

By 18 & 19 Vict. c. 120, s. 96, all pavements are vested in and are under the management and control of the vestry of the parish in which they are situate, and by s. 102 all vaults, arches, and cellars made either before or after the commencement of this Act under any street, and all openings into the same in any such street, shall be repaired and kept in proper order by the owners and occupiers of the houses to which the same respectively belong.

The appellant is the owner of a house which in front of it has an area and cellars. The cellars are formed of brick walls, one of which is the outer wall of the area, and the other runs parallel with such outer wall at a distance of 11ft. 9in. There are also two thin partition walls at right angles to these brick walls, separating the cellars of each house. Extending from the outer wall of the area to the wall which runs parallel with it are large flagstones, the ends of which rest on the walls in question; they form a covering to the cellars, which without them would be open at the top. The outer or upper surface of these flagstones has been used by the public as a footway from the time they have been laid down, and has been worn out by the traffic over them:—

Held, that the cellar in front of the appellant's house was not a cellar within the meaning of s. 102, which applied to cellars which were a complete construction in themselves, arched over and with roofs independent of the pavement; and that the vestry of the parish were bound to repair the flagstones as part of the pavement.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

1. The appellant is the owner and occupier of the house No. 108, Eaton Square, in the parish of St. George, Hanover Square (which is on the north side of the square), and of the cellars hereinafter mentioned. That house (as well as the other houses on the north side) has in front of it an area and cellars.

2. The cellars are formed of brick walls, one of which is the outer wall of the area, and the other runs parallel with such outer wall at a distance of about 11ft. 9in. There are also two thin partition walls at right angles to these brick walls separating the cellars of each house.

Extending from the outer wall of the area to the wall which runs parallel with it are large flagstones, the ends of which rest on the walls in question. They form a covering to the cellars, which without them would be open at the top. The outer or upper sur-

face of these flagstones has been used by the public as a footway from the time they have been laid down.

3. Outside the flagstones are curb-stones which are supported by the outer wall of the cellar near the roadway, and there is also a lower curb, which is supported by the road, so that persons can get from the flagstones to the roadway, which is lower than the footway.

The upper curb-stones, which are level with the flagstones, are twelve inches wide.

4. The cellars were so formed by means of the walls and flagstones before mentioned when the square was built, in or about the year 1830, on land belonging to the builder or his lessor.

The flagstones, when they were first put down by the persons who built the houses, were five inches thick.

5. The upper curb-stones contain holes leading to the coal-cellars, which holes are covered in the ordinary way with iron coverings.

The footway on the north side of the square has been a public footway from the time the flags were so laid down, and was formed by the flagstones and upper curb-stones over the cellars of the houses there, as before mentioned.

6. The flagstones have been worn down by the traffic over them from five inches to two inches and a half, and in the early part of the year 1872 one of them over the appellant's cellars, owing to its being so reduced in thickness, became cracked and dangerous, and the appellant, previous to the notice hereinafter mentioned, applied to the vestry to repair it.

7. The surveyor to the vestry gave notice to the appellant that it was unsafe, and he (the appellant) thereupon, from the interior of his cellar, propped up the broken stone, and the surveyor to the parish filled in the cracks with cement. Afterwards the appellant was required to properly repair his cellar, which he declined to do, as he disputed his liability.

8. On the 10th of April, 1872, notice was duly served upon the appellant that the vaults, arches, or cellars under the street, and belonging or forming part of the messuage, No. 108, Eaton Square, and the covering and opening thereof, were out of repair and in bad order, and the vestry required him forthwith to repair and put

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in proper order the same vaults, arches, or cellars, and the coverings and openings, and in default of his so doing he would be held liable to the consequences of his neglect, and that in the event of his failing forthwith to repair and put the said vaults, cellars, and the coverings and openings thereof in proper repair and order as required, the vestry would cause the same to be done, and proceed against him for the recovery of the expenses.

9. Upon the refusal of the appellant to do the work required the vestry did it, and the expenses, after allowing for the value of the old stones, which were removed, amounted to 8*l.* 13*s.* 4*d.*

It was necessary to substitute one new and entire flagstone for the old stone, inasmuch as there is not under the pavement a brick arch or sub-structure of any kind upon which pavement of smaller flagstones and of less expensive character could be placed.

This sum was duly demanded, and upon the refusal of the appellant to pay that amount, he was, on the 20th of July, 1872, summoned before the magistrate to shew cause why he should not be ordered to pay the same.

10. By 18 & 19 Vict. c. 120, s. 96, all pavements are vested in and under the management and control of the vestry of the parish in which they are situated. The vestry claim the money above-mentioned under s. 102 of the same Act.

By s. 102, "All vaults, arches, and cellars made either before or after the commencement of this Act, under any street, in any parish or district mentioned in either of the schedules A and B to this Act, and all openings into the same in any such street, shall be repaired and kept in proper order by the owners or occupiers of the houses or buildings to which the same respectively belong; and in case any such vault, arch, or cellar be at any time out of repair, it shall be lawful for the vestry or district board of such parish or district to cause the same to be repaired and put into good order, and to recover the expenses thereof from such owner in the manner hereinafter provided."

Section 226: "Where the amount of any compensation, or of any damage, costs, or expenses is to be determined by, or to be recovered before two justices, it shall be lawful for any justice, upon the application of either party, to summon the other party to appear before two justices at a time and place to be named in such summons; and upon the appearance of such parties, or in the absence of either of them, upon proof of due service of the summons, it shall be lawful for such two justices to hear and determine the matter, and for that purpose to examine such parties, or any of them, and their witnesses on oath, and make such order, as well as to the costs or otherwise, as to them may seem just."

12. On the 27th of July, on the appearance of the parties before the magistrate, the appellant contended that the flagstones in question were a portion of the pavement of the street which had

become vested in the vestry under s. 96 of the Act, and which they were bound to repair and replace when necessary.

13. It was contended on behalf of the vestry that the flagstones were part of the cellars, and were the property of the appellant, and that but for them the cellars would have no covering at all, and that the appellant was therefore bound to repair and replace them when necessary, and keep them in proper order.

14. The magistrate ordered the appellant to pay the vestry half the money claimed: viz., 4*l.* 6*s.* 8*d.*, and each party to bear his own costs.

The question for the opinion of the Court was, 1st, whether the magistrate was justified in ordering the appellant to pay the vestry half the money claimed by them. 2nd, whether the appellant was bound to pay the whole or any part of the expense of replacing the flagstones, or whether the vestry was bound to replace them at their own expense.

Manisty, Q.C. (*R. E. Turner* with him). The magistrate was wrong in making the order as he has done. The cellar in question is not a cellar within the meaning of s. 102 of 18 & 19 Vict. c. 120. That section applies to buildings complete in themselves as cellars. The pavement which forms the roof of the cellar was dedicated to the public at the time the cellar was built; the public have worn it out, and the vestry are liable to repair it. This point is alluded to by Erle, C.J., in *Robbins* v. *Jones* (1): "We may refer, by way of illustration only, to the case of one of the squares where the footway at one side consists of large flags, reaching from the outer wall of the area to the outer wall of the cellar. There the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend, the public, who walk upon it and wear it out, without which it might last an indefinite time." Here the public have worn out the pavement, and they must repair it.

H. S. Giffard, Q.C. (*Poland* with him), for the respondents. The decision of the magistrate is right. The stone serves two purposes —it serves as a roof to the cellar, and a pavement to the street.

(1) 15 C. B. (N.S.) at p. 242; 33 L. J. (C.P.) at p. 5.

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It is therefore only just and reasonable that the expense of its repair should be divided between the public and the owner of the cellar. But for the stone, this construction would be an open hole; it is therefore a question of fact how much of the stone forms the covering of the cellar, and how much the pavement. That fact the magistrate has decided. *Robbins* v. *Jones* (1) is not in point. There is no question, in the present case, of a common law liability to repair, as in that case.

Manisty, Q.C., was heard in reply.

QUAIN, J. I am of opinion that the order of the magistrate must be set aside, and that the repair is to be done by the vestry, and not by the appellant. I think that, apart from the statute, which I will consider in a moment, the injury having been caused by the public passing over this pathway, there being no failure of the substructure, it is only just and fair that the public should pay the expense of repairing that which the public have themselves done. Now, looking at the legal right, I think the appellant is not bound to repair it. It is clear, since the case of *Fisher* v. *Prowse* (2), that if a highway is made and dedicated to the public, the public must take it in the state in which it is dedicated. That is laid down in these words in that case: "But the question still remains whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public and accepted by them subject to the inconvenience or risk arising from the existing state of things." It appears that when the way was dedicated the flagstone did not rest on arches, but rested and does rest on walls. The public accept that dedication, although the bottom of the road formed at the same time the roof of the cellar. No doubt the appellant is bound to repair the cellar, but the vestry are bound to repair the roadway which is out of repair. What is out of repair is the roadway, and the

(1) 15 C. B. (N.S.) 221; 33 L. J. (C.P.) 1.
(2) 2 B. & S. 770; 31 L. J. (Q.B.) 212.

public, by using that roadway, have reduced the thickness of this flagstone from five to two and a half inches. I think, therefore, that walking over it has done the injury by the wear and tear; and that being so, I cannot see why the vestry should not repair this road just like any other road. If a person dedicates a highway in good repair, and the vestry accept it, that person is not bound to keep that highway as good as it was at the time of dedication; if the public use it they are bound to keep it in repair from the time of dedication. That appears to me to be not only law, but justice. But this pavement having been dedicated as a way—no doubt, forming the roof of the cellar as well as the roadway—if in using the roadway, as in this case, the road gets out of order, and gets so thin that the flagstone cracks, and the public authorities cannot repair the way without at the same time repairing the roof of the cellar, it seems to me that they are bound to do it on the simple principle that the wear is theirs, and that they ought to remedy it.

The statute says (s. 102): "All vaults, arches, and cellars, and all openings into the same in any such street, shall be repaired and kept in proper order by the owners or occupiers of the houses or buildings to which the same respectively belong." I think this cellar is not within the meaning of this section, but there being a public highway over it, that public highway is so much out of repair that the vestry are liable to put it in repair. I think the observation of Erle, C.J., in the case cited is very much in point. He says: "It seems to me that the public have done the wrong, and that they ought to bear the expense." Our judgment must be that the magistrate's order was wrong.

ARCHIBALD, J. I am also of opinion that the magistrate's order must be reversed. I was at one time disposed to think that his decision was an equitable one. But we have not to do with what is just and equitable. Looking at the statute it appears to me that the pavement being vested in the vestry it must be taken to be pavement and nothing else. The legislature in s. 102 had in view cellars, which would be a complete construction in themselves, arched over and with roofs independent of the pavement; in a case of that kind it is quite clear that the vestry

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would be bound to repair the pavement, while the owner of the cellar would be answerable for any defect in the arch or the roof, or any part of the cellar by which the pavement might be supported. But that is not the case here. The cellar, as originally formed, has the covering of a single paving stone over it, and it would be impossible for the vestry if the stone was out of order to deal with it otherwise than by taking up the whole stone. Now the magistrate has not found distinctly either that this is pavement or roof; his finding goes to this, that he thought it just under the circumstances to make this kind of division. If he had found expressly that this was pavement and not roof, then that might have justified him in refusing to make any order at all; or if he had found the other way, that it was a roof to the cellar and not pavement, then he might have been justified in making an order on the appellant to repair it; but it is found that there was a footway over the cellar, and there is no finding distinctly that this was the roof of the cellar and not pavement. It seems to me that it being pavement and being vested in the vestry it would be their duty to repair it. I quite agree with my Brother Quain, that the decision of the magistrate should be reversed.

Judgment for the appellant.

Attorneys for appellant: *Markby, Wilde, & Burra.*
Attorneys for respondent: *Capron, Dalton, & Hitchins.*

Nov. 18.

BOARD *v.* BOARD.

Tenant by Curtesy—Devisable Interests—Estoppel—Right of Remainderman against Assignee of first Occupier after Testator's Death—Statute of Limitations.

R. A., being tenant by the curtesy of certain premises, devised them by his will to trustees for his daughter Rebecca for life, with remainder to his grandson William. Upon the death of testator, Rebecca entered into possession of the premises purported to be devised, and paid for some years certain annuities charged by the will upon the premises, and was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. William conveyed his remainder to the plaintiff. Rebecca, after she had been in possession more than twenty years, conveyed the premises in fee to the defendant, who, upon her death,

took possession. The plaintiff, the assignee of William, the remainderman, having brought ejectment:—

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Held, that Rebecca having entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the validity of the will, and that the plaintiff was entitled to recover.

EJECTMENT to recover possession of a dwelling-house and premises situate in the parish of Burnham, in the county of Somerset.

The defendant defended for the whole.

At the trial before Grove, J., at the Somersetshire spring assizes, 1873, a verdict was found, by consent, for the plaintiff, subject to a special case, the Court to be at liberty to draw from the facts all the inferences which a jury might have drawn.

In the year 1820 one Robert Amesbury was seised and possessed as tenant by the curtesy of (inter alia) the premises mentioned in the writ of ejectment hereinafter called the disputed premises.

Robert Amesbury was twice married. By his first wife, Hannah, who died intestate about the year 1812, and who was seised and possessed of an estate of freehold of inheritance in the disputed premises, he had issue four daughters, Rebecca, Fanny, Lydia, and Maria, and one son, Joseph. His second wife, Mary Locke, was a sister of his first wife, Hannah.

On the 15th of April, 1800, Fanny Amesbury married one William Board, and by him had issue three sons, William Board, the plaintiff Robert, and Joseph. Fanny Amesbury, afterwards Fanny Board, died, and William Board, in 1818, married her sister Rebecca. The defendant, Thomas Board, is the son of William Board and Rebecca.

Robert Amesbury died in the year 1820, having previously duly made and executed his will (whereof John Amesbury was sole executor), dated the 24th of May, 1819, and a codicil to the will dated the 23rd of August, 1820. By his will, Robert Amesbury (hereinafter called the testator), devised (amongst other things) to William Adams and John Buncombe, as trustees, the disputed premises in trust for his daughter Rebecca for her life and the life of William Board, to live in, provided they, or one of them, should pay unto the testator's three grandsons, William, Robert the plaintiff, and Joseph, the annual sum of 3*l.* each, and after the decease of Rebecca the testator devised (inter alia) the disputed premises

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to his grandson William charged with two annuities of 7*l.* each payable to Robert the plaintiff and Joseph for their lives. The three annuities of 3*l.* each were duly paid until 1826 to William, Robert the plaintiff, and Joseph Board, respectively, by Rebecca Board, respectively, under the circumstances hereinafter appearing.

The testator also devised to his only son Joseph certain other premises situate in the parish of Huntspill, charged with an annuity of 10*l.*, payable to the testator's second wife for life, and after her decease to her children (excepting Ann Board) for their lives, as joint tenants.

By the codicil the testator charged the premises situate at Huntspill, with a further sum of 5*l.* per annum to be paid during her natural life to Rebecca, the second wife of William Board, and he declared that if his son Joseph Amesbury, his heirs, executors, administrators, or assigns, should call in question or dispute the validity of his marriage with Mary Locke, or the marriage of William Board with his daughter Rebecca, then the devises and bequests given to his son Joseph Amesbury should be revoked and be null and void; and he gave and devised the same with their appurtenances unto either of them whose marriage might be called in question, their heirs and assigns for ever.

The will and codicil were proved on the 4th of November, 1820, by Joseph Amesbury. Joseph Amesbury accepted the benefit of the devises to him contained in the will and never disputed or called into question before his death, nor have his heirs or executors ever disputed the validity of the marriages or either of them.

At the death of the testator, Rebecca and William Board were residing with him upon the disputed premises, and upon the death of the testator, Rebecca and William Board continued to remain in the actual enjoyment and occupation of the same.

In the year 1826 the plaintiff purchased of his brother Joseph Board, Joseph Board's annuity of 3*l.*, and from the date of the death of testator down to the year 1834, the plaintiff received the sum of the two annuities from Rebecca Board. In or about the same year 1826 William Board, brother of the plaintiff, sold his annuity of 3*l.* to Joseph Amesbury, who was in the habit of regu-

larly each year deducting that amount from the annuity payable by him to Rebecca Board under the provisions of the will and codicil.

In 1837 William Board, the reputed husband of Rebecca Board, died, leaving Rebecca in occupation of the disputed premises.

In 1842 the annuities payable to the plaintiff and his brother William were in arrear. The plaintiff pressed for payment of the arrears, and eventually an agreement was entered into on the 3rd of November, 1842, between Rebecca Board and the plaintiff that in consideration of Rebecca giving up into the possession of the plaintiff during the term of her natural life two pieces of arable land, the plaintiff acquitted and discharged Rebecca for all arrears of annuity and all annuities that might hereafter become due and owing to him.

The plaintiff, in pursuance of the agreement, took possession of the two pieces of land in satisfaction of the annuities, and still remains in possession of the same.

In 1849 the plaintiff bought of his brother William Board all William's remainder in the two pieces of land last mentioned, and in the disputed premises.

In April, 1863, Rebecca Board sold the disputed premises by auction to her son Thomas Board, the defendant. The plaintiff, with his legal adviser, attended the sale, and the latter publicly stated on behalf of the plaintiff, that Rebecca Board had no right to sell the disputed premises; but the defendant nevertheless persisted in purchasing the premises, and the same, in pursuance of the sale, were duly conveyed by Rebecca Board to the defendant.

For many years prior to the sale, and down to May, 1872, Rebecca Board and her son, the defendant, resided together on the disputed premises, the land being farmed and managed by the defendant.

In May, 1872, Rebecca died, and the defendant continued in possession of the disputed premises. On the 13th of June, 1872, the plaintiff as and being the assignee of the interest and remainder of his brother William Board, demanded possession. Possession was refused, and this action was thereupon commenced.

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The question for the opinion of the Court is, whether the plaintiff is entitled to the disputed premises or to any and what part of them.

Arthur Charles, for the plaintiff. The plaintiff has a good title to the premises in question. He claims through the remainderman, and as against him, the defendant, who claims through Rebecca, the tenant for life, is estopped from denying the validity of the will. Rebecca, the tenant for life, entered under the will, and has acted under the will by paying the annuities charged upon the property. She cannot, therefore, now say that the will is void and defeat the interests of the remainderman: *Asher* v. *Whitlock* (1). It is true the heir is barred, but Rebecca cannot acquire the fee under the Statute of Limitations. In *Anstee* v. *Nelms* (2) Martin, B., points out that the Statute of Limitations was never intended to apply to cases like the present; that a person cannot enter under a will, and then turn round and say that the property did not pass.

T. W. Saunders, for the defendant. The case is distinguishable from *Asher* v. *Whitlock* (1). There the testator had a devisable interest; he had acquired the fee by a possession undisturbed for twenty years: here the testator was merely a tenant by the curtesy, and when he died he had nothing to devise. Rebecca's occupation, therefore, was really that of a trespasser from the date of her entry, and after the lapse of twenty years she acquired the fee. The defendant claims through Rebecca, and has a good title.

Charles, in reply.

BLACKBURN, J. In this case I think the plaintiff is entitled to our judgment. The facts are that Robert Amesbury was tenant by the curtesy, and consequently when he died he had nothing to devise. Joseph Amesbury was the heir-at-law, and, but for the Statute of Limitations, would be entitled to the estate. Robert Amesbury, however, made a will, leaving the property to Rebecca for life, with remainder to William in fee. Rebecca entered into possession, and enjoyed the property under the will, paying the

(1) Law Rep. 1 Q. B. 1.
(2) 1 H. & N. at p. 232; 26 L. J. (Ex.) at p. 8.

legacies and annuities, and in every way clearly shewing that she continued in possession because she was a devisee under the will. She lets the defendant into possession, who claims under her, but he, being privy in estate to her, is subject to all the estoppels that would have estopped her. Then the question is, whether Rebecca, having taken under the will which gave her an estate for life, is not estopped from saying that as against William or the person claiming under him, the will, under which she came in as tenant for life, and William was remainderman, is void; she cannot be allowed to assert that, although she was let in and enjoyed under the will, nevertheless it was void; and that the heir-at-law, Joseph, is entitled to the land, and as twenty years have run against his title he is barred, and she, having acquired the fee by twenty years' undisturbed possession, can prevent William from taking under the will. Rebecca claimed under the will, and retained possession under the will, and she, as against everybody interested in the will, is estopped from denying its validity.

The case is like that of a tenant coming in under a landlord: he is estopped from denying his landlord's title. As to the point that Robert, being only a tenant by the curtesy, had nothing to devise, it may be said that in many instances the landlord has only an equitable title, and yet the tenant is estopped from disputing such title. I think if the law were otherwise the consequences would be disastrous, for how unjust it would be if a person who comes in under a will as tenant for life, and continues in possession until twenty years have elapsed, could say there was a latent defect in the title of his predecessor, and the estate devised really belonged to the heir-at-law, and his title being barred, he, the tenant for life, is entitled to the property in fee simple. It is contrary to the law of estoppel that he who has obtained possession under and in furtherance of the title of a devisor should say that such title is defective. My Brother Martin, in *Anstee* v. *Nelms* (1), says that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful, so as to give to his heir a right against a remainderman. That seems directly in point. It is good sense and good law. All we have to decide

(1) 1 H. & N. at p. 232; 26 L. J. (Ex.) at p. 8.

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here is that Rebecca, having entered under the will, William, the remainderman under the same will, has a right to say that she and all those claiming through her are estopped from denying that the will was valid.

MELLOR, J. I am of the same opinion. The only person who could dispute the possession of Rebecca under the will was the heir-at-law. He never disputed the possession, and his title to the estate is barred by the operation of the Statute of Limitations. Whatever his motive was, whether he received advantages under the will or not, or whether he chose to abstain from making any claim or not, is wholly immaterial, because the effect of the statute is absolutely to bar him at the end of twenty years. That being so, Rebecca enters into possession under the will, taking a life estate, and during the continuance of that estate effects a sale adversely to the interests of the remainderman under the will. Now, Rebecca having accepted the estate under the will, and having acted under the will, treating the will as a perfectly valid will, cannot defeat the title of the remainderman under the will by alleging that the devisor had no title. It would be contrary to the wholesome doctrine of estoppel to allow a person who takes a limited interest under a will, after she has been in possession for twenty years under the will, to convert her limited interest into a fee. A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will. Here the contest is between two persons, one claiming through the tenant for life, the other through the remainderman. I think the title of the remainderman must prevail, and the plaintiff is therefore entitled to our judgment.

QUAIN, J. I am of the same opinion. I decide this case on the simple point that a person who takes under a will, and acts on the will in paying the legacies and annuities given under it, cannot afterwards turn round and place himself in a different position, and maintain that he is in a position adversely to those who take under the same will. Rebecca having entered into possession as a tenant for life, was estopped as against all those who are

in remainder to her under the will, from saying, in fact, that her father, Robert Amesbury, had not the right to make the will.

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Judgment for the plaintiff.

Attorneys for plaintiff: *Reed & Lovell, for Read & Cook, Bridgwater.*

Attorneys for defendant: *Edwards, for Lovibond, Bridgwater.*

BOLTON *v.* MADDEN.

Nov. 25.

Contract between Subscribers to a Charity to vote for a Candidate—Consideration —Agreement against Public Policy.

The plaintiff and defendant were both subscribers to a charity, the objects of which were elected by the subscribers who had votes proportioned in number to the amount they had subscribed. They expressly agreed that if the plaintiff would give twenty-eight votes for an object of the charity whom the defendant favoured, the defendant would at the next election give twenty-eight votes for such object of the charity as the plaintiff should then favour:—

Held, that there was a legal consideration for the defendant's promise, and that the agreement was not void as against public policy.

DECLARATION for money paid by the plaintiff for the defendant at his request. Plea, never indebted. Issue thereon.

At the trial at the Lord Mayor's Court, before the Common Serjeant, the judge ordered a nonsuit, with leave to the plaintiff to move to enter a verdict for 7*l.* 7*s.*

A rule was afterwards obtained accordingly on the ground that the Common Serjeant had ruled that the facts proved constituted only an imperfect obligation and did not amount to a legally binding contract.

The facts of the case, the course of the trial, and the arguments sufficiently appear in the judgment of the Court.

Nov. 20. *Templeton* shewed cause.

F. Turner in support of the rule.

The following cases were cited: *Blachford* v. *Preston* (1);

(1) 8 T. R. 89.

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Haigh v. *Brooks* (1); *Bainbridge* v. *Firmstone* (2); *Shadwell* v. *Shadwell* (3); *Sterry* v. *Clifton*. (4)

Cur. adv. vult.

Nov. 25. The judgment of the Court (Blackburn, Mellor, and Quain, JJ.) was delivered by

BLACKBURN, J. In this case, tried in the Lord Mayor's Court, the plaintiff was nonsuited, but the jury, under the direction of the Common Serjeant, assessed the damages at 7*l.* 7*s.*, and leave was given to the plaintiff to move to enter a verdict for that amount; the pleadings to be amended if necessary.

From the notes, it appears that there was no dispute as to the facts. The plaintiff and defendant were both subscribers to a charity, the objects of which are elected by the subscribers who have votes proportioned in number to the amount they have subscribed. The plaintiff and defendant expressly agreed that if the plaintiff would give twenty-eight votes for an object of the charity whom the defendant favoured, the defendant would at the next election give twenty-eight votes for such object of the charity as the plaintiff should then favour. The plaintiff performed his part of this agreement, and voted for the candidate favoured by the defendant; but the defendant made default, and did not furnish any votes for the candidate favoured by the plaintiff at the next election. The plaintiff in consequence subscribed 7*l.* 7*s.* to the charity so as to obtain twenty-eight more votes in his own right, which he used in lieu of those which the defendant had promised to supply him.

There can be no doubt that there was an express promise by the defendant and a breach of that promise; but the doubt raised was, whether the consideration was such as to make that promise enforceable at law.

The general rule is, that an executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is "either for the benefit of the defendant or to

(1) 10 Ad. & E. 309.
(2) 8 Ad. & E. 743.
(3) 9 C. B. (N.S.) 159; 30 L. J. (C.P.) 145.
(4) 9 C. B. 110.

the trouble or prejudice of the plaintiff:" see Com. Dig. Action on the case in assumpsit, B. 1. If it be either, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced.

The argument for the defendant was that the subscriber to a charity is under an obligation to give his votes for the best object, and that the plaintiff, if he gave his votes at the first election to what he thought the best candidate, incurred neither trouble nor prejudice, so that there was in that point of view no consideration; and if he gave his votes to the candidate whom he did not think the best, the whole agreement was void as against public policy.

But though some of us, at least, much disapprove of this kind of traffic, we can find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases, answering only to his own conscience and reputation for the way he exercises his power.

We think, therefore, the nonsuit cannot be supported, and as there was evidence justifying the jury in assessing the damages as they have done, the rule must be made absolute to enter the verdict for the plaintiff.

Rule absolute.

Attorney for plaintiff: *R. B. Lowndes.*
Attorneys for defendant: *Walter Moojen & Son.*

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Nov. 10.

THE METROPOLITAN BOARD OF WORKS, APPELLANTS; FLIGHT, RESPONDENT.

Metropolitan Building Acts, 1855 *and* 1869 (18 *&* 19 *Vict. c.* 122, *Part II. ss.* 69—73, 77—79; 32 *&* 33 *Vict. c.* 82, *s.* 5)—*Dangerous Structures, Fees and Charges in respect of, chargeable to Owner.*

A structure within the metropolis having been surveyed and reported dangerous, notice was served on the owner, under 18 & 19 Vict. c. 122, s. 69—73; and not having repaired it, he was summoned by the Metropolitan Board of Works before a magistrate; the summons was adjourned from time to time, and ultimately withdrawn, the owner having in the meantime duly repaired the structure. The board sought to charge against the owner, under s. 73, as "expenses incurred in respect of a dangerous structure," in addition to the surveyor's fees allowed by ss. 77—79, the following items, which by resolution of the board, had been resolved should be charged against owners in respect of dangerous structures, viz., 3*s.* 6*d.*, for preparation of notices and forms; 2*s.* 6*d.*, for clerk's time in service of notices; and 2*s.* 6*d.*, for general office expenses:—

Held, that the board were not entitled to charge the last item, but were entitled to charge the other two.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

2. On the 11th of January, 1873, the respondent, as owner of certain premises, appeared before the magistrate in pursuance of a summons to answer the complaint of the Metropolitan Board of Works for neglecting to pay on demand certain sums for the surveyor's fees, and special services set out in paragraphs 5 and 8.

3. On the hearing of the summons it was proved that a structure, 5, Davey's Buildings, Bedfordbury, had upon the 30th of January, 1872, been reported to the Metropolitan Board of Works, acting in execution of the Metropolitan Building Act, 1869 (32 & 33 Vict. c. 82), to be in a dangerous state, and that thereupon a requisition for a survey of the structure had been issued by the board, directed to a competent surveyor, requiring him to certify his opinion as to the state of the structure. On the 2nd of February, 1873, the surveyor certified the structure to be in a dangerous state; and upon the 3rd of February notice in writing, as required by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 72, was given to and served upon the respondent, requiring him to repair and secure the structure.

4. The respondent did not obey the notice, and on the 17th of

February it was further reported by the surveyor to the board that the works required by the notice to be done had not been commenced. On the 4th of April it was reported that the works had been partly carried out, and on the 3rd of May it was again reported that nothing had been done since the last report of the 4th of April. Thereupon complaint was made before the magistrate at Bow Street, and a summons obtained thereupon, directed to the respondent, calling on him to appear and answer a complaint by the board against him for having failed to comply with the requisition of the notice of the 3rd of February. The summons came on for hearing on the 13th of May, and was attended on behalf of the board by their officer, when in consequence of the repairs being in progress the summons was adjourned by consent until the 27th of May, upon which day the respondent attended, and on his statement that the works were still in progress a further adjournment was granted until the 10th of June, upon which latter day the case was again adjourned until the 1st of July, when the surveyor reported that the works had been completed, and with the permission of the magistrate the summons was withdrawn.

5. It was further proved that the sum of 2*l.* 7*s.* 6*d.* had been actually paid by the board to the surveyor for work done by him, services rendered, and expenses incurred by him according to the following account:—

	£	*s.*	*d.*
Feb. 2. To making a survey of the structure known as No. 5, Davey's Buildings, Bedfordbury, not exceeding five squares, and consisting of five stories, and used as a dwelling, reported to the Metropolitan Board of Works as being dangerous, and certifying to the said board my opinion thereon as required by the statute		15	0
Special Services.			
Feb. 17, March 20, April 10, May 3. The board's notice not having been complied with at the above structure, certified dangerous, reporting thereon	1	0	0
May 27, June 10. To attending the police court to give evidence .		7	6
July 1. To visiting the structure, and reporting to board completion of works		5	0
	2	7	6

And it was also alleged that the board had incurred other expenses, that is to say, 10*s.* 6*d.* for costs in respect of the structure so certified to have been in a dangerous state.

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6. The sum of 10*s.* 6*d.* was charged in accordance with a table of fees settled, by a resolution of the board on the 12th of May, 1871, to be levied upon owners or occupiers in respect of expenses incurred by the board in exercising its powers over the dangerous structures of the metropolis pursuant to the Metropolitan Building Act, 1869.

7. The resolution of the board, together with the table of fees so settled, was put in evidence, and all the items of the subjoined account, including the item of general office expenses, were in accordance with this table.

8. It was proved that the sum of 10*s.* 6*d.* was made up of the following items:—

	s.	*d.*
1. For preparation of notices, forms for same, and postage	3	6
2. Service of notices, clerk's time . . .	2	6
3. For summons	2	0
4. General office expenses	2	6
	10	6

9. Evidence was given in vindication of the reasonableness of the table of fees that the sum of 10*s.* 6*d.* demanded of the respondent was a fair proportion, if he was liable to pay the same, to require him, as the owner of a dangerous structure, to contribute towards the expenses incurred generally by the board in the exercise of its jurisdiction over the dangerous structures of the metropolis under the Metropolitan Building Act, 1869.

10. In reference to the sum of 2*l.* 7*s.* 6*d.* paid to the surveyor, it was objected, on the part of the respondent, that in point of law the surveyor was entitled to the sum of 2*l.*, and no more, for all or any services he might have rendered in pursuance of the requisition from the board, directing him to visit and report on the said structure, situate at 5, Davey's Buildings, Bedfordbury, and that, as to the item of 7*s.* 6*d.*, "To attending the police-court to give evidence," no charge could be made for it. The magistrate made an order on the respondent, requiring him to pay 2*l.* of the amount claimed in the account, but he made no order as to the sum of 7*s.* 6*d.* claimed for attendance at the police-court.

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11. As to the sum of 10*s.* 6*d.*, it was contended, on the part of the respondent, that the Metropolitan Board of Works had no power to make any such charge; that the only expenses the respondent could be called upon to pay were the actual expenses incurred by the Board for work actually done upon and to the particular structure; that the board had no power to frame a table of fees to be applied generally, but were only entitled to be reimbursed for the moneys actually expended in each individual case; and that, by the Metropolitan Building Act, 1869 (32 & 33 Vict. c. 82, s. 5) (1), all expenses incurred by the board in carrying into execution Part II. of the Act of 1855 (being the sections relating to dangerous structures) should be deemed to be part of the expenses in carrying into execution the said Act, and should be raised and paid accordingly. It was replied, on the part of the board, that it was clear, from the Metropolitan Building Act, 1855, that the legislature intended that the expenses incurred by the authority supervising and controlling the dangerous structures of the metropolis should be borne by the owners or occupiers of such dangerous structures, and should not fall upon the rates; that by s. 4 of the Metropolitan Building Act, 1869, powers being given to the board over all the dangerous structures of the metropolis, the board was entitled, under s. 73 of the Metropolitan Building Act, 1855, to be repaid all expenses incurred in the exercise of those powers; that it was clear that heavy expenses had been entailed upon the board in the general exercise of its control and supervision of the dangerous structures of the metropolis; that the items set out in the table of fees for the purpose of meeting these expenses had been fairly and regularly calculated, so as to make every owner or occupier of a dangerous structure pay his fair proportion of them, according to the amount of the trouble and expenditure to which he might put the board; that the charges contained in the sum of 10*s.* 6*d.* were reasonable and proper.

The magistrate refused to make any order upon the respondent in reference to the 10*s.* 6*d.* for special services.

The question for the opinion of the Court, therefore, was, whether, under the circumstances, the magistrate was right in

(1) See post, p. 62, n.

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refusing to make an order for the 8*s.* 6*d.* or any part thereof; the sum of 2*s.* costs of the withdrawn summons, part of the sum of 10*s.* 6*d.*, not being in contest between the parties.

Philbrick, for the appellants. Part II. of the Metropolitan Building Act, 1855, 18 & 19 Vict. c. 122, relates to dangerous structures, the powers given to the commissioners of police being transferred by the Amendment Act, 1869 (32 & 33 Vict. c. 82, s. 4), to the Metropolitan Board of Works. Proceedings in the present case were duly taken under ss. 69—73 of the Act of 1855; and the board are entitled to charge the 8*s.* 6*d.* in addition to the surveyor's fees, under s. 73, which enacts that "all expenses incurred by the commissioners [now the board] in respect of any dangerous structure, by virtue of the second part of this Act, shall be paid by the owner of such structure."

[QUAIN, J. How can the board be entitled to 2*s.* 6*d.* for general office expenses in addition to 2*s.* 6*d.* for clerk's time in serving the notice, and 3*s.* 6*d.* the costs of preparing them?]

The 2*s.* 6*d.* for general office expenses is expressly allowed by resolution of the board to be charged against owners of dangerous structures.

[BLACKBURN, J. If all the owners of structures kept them in order, the general office expenses would go on just the same.]

It is simply a mode of charging fees which it is expressly in the power of the board to fix.

[BLACKBURN, J. If the fees are such as are allowed by the Act.]

The appellants do not press for this item; but the other items making up 6*s.* they were entitled to charge against the respondent; unless s. 5. of the Act of 1869 (1), as the respondent contends, has repealed s. 73. But that is not so; all that s. 5 does is to enact that expenses under Part II. of the Act of 1855, shall

(1) 32 & 33 Vict. c. 82, s. 5: "All payments directed by Part II. of the Metropolitan Building Act, 1855, as amended by this Act, to be made by the Metropolitan Board of Works in respect of any structure situate within the limits of that Act, and not within the City of London, and all expenses incurred by such board in carrying into execution Part II. of the said Act, shall be deemed to be part of their expenses in carrying into execution the said Act, and shall be raised and paid accordingly."

be part of the board's expenses of carrying that Act into execution, they having, under that Act as it originally stood, nothing to do with Part II.

Waddy, for the respondent. The expenses which s. 73, enables the board to charge against the owners are the expenses incurred in doing the repairs, not the office expenses of serving notices, &c. The only special services allowed to be charged for are fees to the surveyor by s. 78; and s. 79 enacts that all fees to be paid to the district surveyor shall be deemed to be expenses incurred by the board in the matter of dangerous structures; but there is no such enactment as to office expenses, which must be borne by the board and paid out of the rates.

[QUAIN, J. The words in s. 73 are "all expenses incurred in respect of any dangerous structure;" the words are quite general, and there is nothing to confine it to the expenses merely of the actual repairs.]

If these were expenses within the meaning of s. 73, they are by s. 5 of the Act of 1869 to be deemed part of the board's expenses in carrying the Act into effect, and are to be raised and paid accordingly; this, in effect, transfers the expenses from the owner to the general rates.

Philbrick, was not heard in reply.

BLACKBURN, J. It appears to us that the magistrate was right in disallowing the 2*s.* 6*d.* for general office expenses, but wrong as to the 6*s.* The case must be remitted, with this intimation of our opinion.

QUAIN and ARCHIBALD, JJ., concurred.

Case remitted accordingly.

Attorney for appellants: *Solicitor to the Board.*
Attorneys for respondent: *Lewis & Sons.*

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Nov. 10.

THE QUEEN *v.* PERCY AND OTHERS, JUSTICES OF CUMBERLAND.

Justices, Refusal to do an Act relating to the Duty of their Office—Rule under 11 & 12 Vict. c. 44, s. 5—Mandamus.

Under s. 5 of 11 & 12 Vict. c. 44, it is only where justices would need protection if they proceeded to do "any act relating to the duties of their office," that a rule, calling upon them to shew cause why such act should not be done, can be granted.

Therefore, where justices had refused to hear a summons against a person for having a board over his door, stating that he was licensed to retail beer, &c., he not being so licensed, contrary to 35 & 36 Vict. c. 74, s. 11, the Court refused a rule against the justices under 11 & 12 Vict. c. 44, but granted a rule for a mandamus.

A SUMMONS having been granted on an information against one Miller Irving, for having over his door a board stating that he was licensed to retail beer, &c., whereas he was not so licensed, contrary to 35 & 36 Vict. c. 94, s. 11, when the case came on for hearing before the justices sitting in the petty sessional division of Allerdale, in the county of Cumberland, the defendant produced an original licence, granted at the licensing sessions held since the date of the alleged offence; and the justices refused to go into the matter of the information on the ground that it was a question of licence which had been dealt with by other justices.

Bompas applied, on affidavits disclosing the above facts, for a rule under 11 & 12 Vict. c. 44, s. 5 (1), calling upon the justices

(1) 11 & 12 Vict. c. 44, s. 5. And whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any Act to be done by such justices might be considered and adjudged by a Court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him; be it therefore enacted, that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to shew cause why such act should not be done; and if after due service of such rule good cause shall not be shewn against it, the said Court may make

to shew cause why they should not hear and adjudicate upon the summons.

[BLACKBURN, J. The justices would incur no liability if they proceeded. The generality of the words "where justices shall refuse to do *any act* relating to the duties of their office" is controlled by the recital of the section; and it is only where the justices need protection that the enactment applies.

QUAIN, J. The last clause in the section confirms that view.]

The practice has been uniform for many years, to grant a rule under the statute in cases like the present. (1) The remedy is much cheaper and more speedy than that by mandamus; but if the Court will not grant a rule under the statute, the applicant asks for a rule nisi for a mandamus.

BLACKBURN, J. We cannot grant a rule under the statute; but the applicant is entitled to a rule nisi for a mandamus.

QUAIN and ARCHIBALD, JJ., concurred.

Rule accordingly. (1)

Attorneys for applicant: *Bischoff, Bompas, & Bischoff.*

the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.

(1) See *Reg.* v. *Aston* (1 L. M. & P. 491, 492).

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Nov. 11.

LEWIS AND WIFE *v.* THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Negligence—Railway Company—Invitation to Passengers to alight.

The plaintiff was a passenger on the defendants' railway from A. to B.; while the train was passing through B. station the company's servants called out the name of the station, and shortly afterwards the train stopped. The carriage in which the plaintiff travelled stopped a little way beyond the platform, and several carriages and the engine, which were in front of that carriage, stopped at some distance from the platform. The plaintiff, who was well acquainted with the station, in alighting from the carriage was thrown down and injured in consequence of the train being backed into the station for the purpose of bringing the carriages alongside the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station:—

Held, that there was no evidence of negligence on the part of the company to render them liable to an action.

APPEAL from the county court of Middlesex holden at Westminster.

This was an action of tort commenced in the Court of Queen's Bench and remitted to the Westminster County Court under 30 & 31 Vict. c. 142, s. 10.

The plaint alleged that the action was for negligence in carrying the wife as a passenger upon the defendants' railway, whereby she was injured, and for the loss of services sustained by the husband, and for medical expenses incurred by him.

The cause was tried on the 21st of February, 1872, before the judge and a jury, when the jury found a verdict for the plaintiffs, with damages 20*l.* This verdict was, on the application of the defendants, set aside by the judge, and a new trial was ordered. On the 21st of June, 1872, the cause was again tried before the judge and a jury.

The evidence given on behalf of the plaintiffs, so far as is material, is as follows:

The plaintiff, Mary Ann Lewis, on her examination-in-chief, said: "On the 7th of October, 1871, at a few minutes past seven in the evening, I started from St. Mary Cray for Bromley, in a third-class carriage of defendants. I paid 4*d.* for my ticket. The train was late at St. Mary Cray. When it arrived at Bromley station I heard 'Bromley' called out several times. I know the

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station well. After I heard 'Bromley' called out the train stood still. I was in the act of getting out, and a gentleman in the same compartment with me opened the door. I had a basket and large parcel. When the gentleman opened the door I wanted to get my basket; he wished me to get out first, and said he would hand me out my goods. I put my hand on the door, and my foot on the step, and a sudden jerk of the train threw me off the step on to the end of the platform. When I got up and was getting out of the carriage the train was quite still; the sudden jerk threw me down. I fell on the edge of the platform, just clear of the bridge, where the platform joins the bridge. I fell just off the platform. The jerk of the train threw me from the edge of the door on to the platform. I would have fallen on the platform provided there had been sufficient ground to hold me. Some wires were outside; but for those wires I should have been under the railway carriage; they protected me from the wheels of the railway carriage. The carriage I was in went close to the edge of the platform, as near as it could be. If the train had been a little further back I would have fallen or been upon the platform. After the jerk the train shunted back some distance. My knee was very much hurt. I was taken to a cab. Before that the guard asked me if I heard him call out 'Bromley.' I said I did not. He said he called out, 'Keep your seats.' I did not hear any one call out 'Keep your seats.' I told the guard that."

On cross-examination she said she knew the Bromley station very well. "I had observed it many times before this occasion. I knew the platform goes quite up to the brickwork of the bridge; the brickwork of the bridge in fact joined the end of the station. When I fell I did not come upon the ground. I was thrown suddenly from the step of the carriage; one foot was on the step, and my hand was on the carriage door; I was suddenly thrown from the carriage door to the edge of the platform. I came on to the wires. The wires adjoin the platform; they come quite up to it; they are lower than the platform. I found myself at the edge of the platform upon the ground." Question: "As the platform comes up close to the end of the bridge, you were under the bridge?" Answer: "I could not be under the bridge." Question: "If the platform came absolutely to the bridge, and

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you were under the bridge, you would not have fallen on the platform?" Answer: "It was not far under the bridge." Question: "Could you have been anywhere else than under the bridge?" Answer: "I could not be under the bridge." Question: "What were you near?" Answer: "The brickwork of the platform. The brickwork was above me. There were other persons in the carriage. After the train stopped I prepared to get out. The gentleman said I was to get out, and he would hand me out my basket and parcels. I was in the act of stooping down to lift them up myself; he opened the door. He did not caution me not to got out because it was dangerous to do so. I do not know whether any other passenger opened the door. I could not say whether any one from the outside opened it. There was no one close by. I did not open the door. Previous to leaving the train I did not hear any one call out 'Keep your seats'; I heard only 'Bromley, Bromley.' I travel on the line sometimes once or twice a week, and I know it is the practice to call out the name of the station as the train comes up to it."

On re-examination the witness said: "The train was perfectly still when I endeavoured to get out. I was in the front part of the train, not in the back part of the carriages." In answer to the judge she said: "There is an archway at the further end of the platform coming from St. Mary Cray, and the railway goes under it. The platform goes up to the bridge and adjoins it. Part of the train was standing under the bridge when I got out, and the engine was on the other side. My carriage was just at the end of the platform. If my carriage had been a little further back I should have fallen on to the platform. I do not know that I fell against an iron bar. I could not tell. There is an iron bar adjoining the platform; that is the bar the wire is on."

Richard Elliott said: "On the 7th of October I came in the train from Sevenoaks junction to Bromley; the train was due at Bromley at 7.29 p.m.; it was late. When the train came to the Bromley station several officials called out 'Bromley.' I was in the hind-part of the train, and had my basket in the back of the train in the luggage break. After 'Bromley' was called out the train stopped. I got out and went to the back part of the train. I walked seven or eight yards, and then the train shunted back

about three or four rods. I did not hear any guard call out, 'Keep your seats.'"

Thomas Strong said: "I am a plumber and glazier, and reside at Bromley. I was a passenger in the train from St. Mary Cray. I was in the fore-part of the train. I had my basket and my frame of glass on my back. When we got to Bromley station I heard 'Bromley' called out three times. The train came to a stand; my basket was on the seat of the carriage. I took my basket in my hand when the train stopped. The frame was strapped on my back. I stood upright, and bent over to take hold of the handle of the door; all at once the train shunted back and threw me back, and my glass went against the back of the carriage and two large sheets of my glass were broken. I was not injured. I did not attempt to get out when the train gave me that jerk. I stopped till it came to a stand again. I heard no one call out, 'Keep your seats.'"

On cross-examination he said: "They may have called out, 'Keep your seats,' but I did not hear them. I was in the fore-part of the train, near the engine, with my back to the engine, up at the fore-end of the train underneath the bridge. I was in the fore-part of the train as it ran up through Bromley. I put my arm over towards the door, and then the train shunted back and gave me a jerk, and then I stayed till the train went back and came to a stand. I am almost certain I was within three or four carriages of the engine. I cannot say how much I was under the bridge; I should not call the fore-part that part that was going to London. I should call it the back of the train."

In answer to the judge the witness said: "I know some portion of the train was a long way beyond the station where it used to stay. I was thrown back. I was incumbered with the glass at my back; after the jerk the train put back."

In answer to a juror the witness said: "I cannot exactly say whether the carriage I was in when I first attempted to get out was under the bridge."

At the conclusion of the plaintiffs' case the judge stated that, in his opinion, there was no evidence of negligence on the part of the defendants to go to the jury, and that it was his duty to direct a nonsuit; but the plaintiffs refused to be nonsuited, and

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the judge thereupon directed the verdict to be entered for the defendants.

The question for the consideration of the Court was, whether the verdict entered for the defendants ought to be set aside and a new trial ordered.

B. T. Williams, for the plaintiffs. The defendants were guilty of negligence. The officials called out "Bromley," and then the train stopped. The female plaintiff reasonably supposed, under these circumstances, she was to alight. The calling out the name of the station, coupled with the stopping of the train, was an invitation to her to get out of the carriage: *Cockle* v. *London and South Eastern Ry. Co.* (1) While she is acting on the invitation, and is about to get down from the carriage, the train is suddenly shunted back and she is injured. Shunting back the train without notice is an absence of ordinary care in the management of the train, and is negligence for which the defendants are liable.

W. G. Harrison, for the defendants, was not called upon.

BLACKBURN, J. I think it is not necessary to hear the defendants' counsel. The question is, whether (the woman having unquestionably sustained injury) the judge could say there was evidence on which the jury could reasonably find that there was negligence on the part of the defendants or their servants, which occasioned injury to the plaintiff. The facts appear to be abundantly clear on the female plaintiff's own story. It appears that the train was coming up to the station, and some official on the platform called out, "Bromley—Bromley." Calling out the name of the station I understand, and have always understood, to mean this, that it is an intimation to all who are travelling by the train that the station at which the train is about to stop is that particular station. When the servants of the defendants called out "Bromley," the train was still going forward; and the train, by one of those accidents that will sometimes occur, overshot the platform, so that, as the plaintiff herself said, the engine went beyond the bridge, and part of the train went under the bridge and passed the platform.

(1) Law Rep. 7 C. P. 321.

Immediately after that there was an order given for the train to come back to the platform, and the train was backed. The female plaintiff had in the meantime proceeded to get out, and in trying to get out, and in consequence of trying to get out at the time the train began to back, a jerk comes, throws her down, causing the injury. The question is, whether there was negligence on the part of the defendants' servants causing her to get out at the time and place she did? Mr. Williams has argued that if the plaintiff supposed she was to get out at the place at which the train stopped, and was injured, the defendants are liable. I do not think so, unless that supposition was induced by the acts of the company's servants; but the plaintiff could not have supposed that, because she says that she knew the place well; that she saw her carriage was not alongside the platform, but at the edge or the corner of it, and that part of the train was beyond the platform. I see no evidence in this case of an act on the part of the company's servants to induce her or to justify her in alighting at the spot where she was getting out. From all the circumstances she, as a reasonable person, must have believed that the train, which had passed the platform, would come back again; that it would not stop under the bridge and let the passengers in the further carriages get out upon the line, and, consequently, she had no business to get out at the place she did unless the company's servants told her to do so. There was, therefore, no evidence from which the jury could have reasonably found negligence. I do not agree with Mr. Williams that calling out the name of a station is an invitation to passengers to alight. On the contrary, the name of the station is generally called out as the train is passing on. Every person must have heard porters at a railway station call out something, which, if he happens to know the name of the station, he can recognise; if not, it frequently happens that the passenger cannot make out what name it is that the porters are calling out. Calling out the name of a station is not an invitation to alight. *Cockle* v. *London and South Eastern Ry. Co.* (1) is distinguishable. In that case there was clear evidence that the train had been brought to a final standstill, and that the passengers were to get out at that place, or not at all. I think there was no evidence on

(1) Law Rep. 7 C. P. 321.

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which the jury could find for the plaintiffs, and that consequently the Judge was right in directing a verdict for the defendants.

QUAIN, J. I am of the same opinion. This is a case manifestly where the female plaintiff had no reasonable ground for believing that the train had finally stopped, so as to entitle her to alight at the particular spot. She says herself that she knew the station very well, and that she had been in the habit of travelling on the line once or twice a week. She was in the front part of the train. Four carriages in front of her, as well as the engine and tender, had actually shot so far beyond the platform that they were at the other side of the bridge, and her own carriage was close to the end of the platform and well up to the bridge. She knowing the place, when she looked out and saw the position of the train, must have seen at once that the train was not in its proper position; and if she had thought for a moment, she must have known that the train would be backed in order to get it into its proper place alongside of the platform. With a knowledge of the station, and without any express invitation to alight, and without having the door opened for her by any porter—only having heard "Bromley" called out—which is done to give notice to the passengers that the train had arrived at that particular station, and that they were to prepare to alight—she gets out. The company had done no act to induce her to believe that the train had arrived at a place where it would stop, so as to justify her in assuming that the company had given her an invitation to alight at that particular spot. I think the verdict was right.

ARCHIBALD, J. I am also of opinion that there was no evidence in this case to go to the jury. No doubt there may be conduct on the part of the company, and the circumstances may be such as to amount to an invitation to get out without the actual opening the door and bidding the passenger to alight. If the train is in its proper place, or if the train is allowed to stand still for a sufficient length of time, there may be, under some circumstances, an intimation at least that the passengers may alight. But the circumstances are entirely different here. The train had reached beyond the platform; for, according to the evidence, it is clear that a

considerable portion of it was beyond the bridge, and the carriage in which the plaintiff herself was travelling was next to the corner of the platform. The slightest attention on her part must have made her aware that, as matters stood, it was dangerous for her to alight. She, knowing the station as she did, must have come to the reasonable conclusion that that was not the place she ought to alight at; that there was something more to be done, and that the train would be pushed back before it was right and proper for her to alight. Being well acquainted with the platform and the station—and the evidence shewing that the train did not wait a sufficient time and give her fair intimation that she might alight without danger—she chooses to get out of the carriage. The evidence as to the time the train stopped shews it was only for a few seconds. One of the witnesses states that he had a frame strapped on his back; he had not to wait to put it on; and that when the train stopped he stood up immediately, and then he put his hand on the door; the train shunted back. We may conclude that he was an active man, carrying a burden, and therefore did not lose much time in attempting to get out of the carriage; but he says before he got out of the carriage the train shunted back, so that the female plaintiff must have got out very hastily and in a great hurry, and at a time when there was nothing done on the part of the company or their servants that she might have taken to be an intimation or invitation that she might safely get out. Under these circumstances, I think the verdict was right.

Judgment for the defendants.

Attorneys for plaintiffs: *Martin, Gregory, & Bowerman.*
Attorney for defendants: *J. C. Church.*

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Nov. 14.

REDWAY *v.* McANDREW AND OTHERS.

Pleading—Demurrer—Reasonable Intendment—Action for maliciously arresting Ship—Allegation that Proceedings terminated in Plaintiff's Favour.

Declaration that the defendants maliciously and without reasonable or probable cause caused the plaintiff's ship to be arrested for necessaries supplied by H. under a warrant from a county court, and to be detained until the proceedings in the court were determined and the ship released:—

Held, on demurrer (by Blackburn and Archibald, JJ.; Quain, J. dissenting), that it appeared by reasonable intendment that the proceedings were determined in the plaintiff's favour, and that the declaration was therefore good.

DECLARATION that the plaintiff was the owner and possessed of a certain ship called the *Duchess of Sutherland*, and domiciled and resident in England, as the defendants always well knew, and the defendants, by their falsely, and maliciously, and without reasonable or probable cause, representing to the registrar of the county court of Cornwall, holden at Truro, that one George Hayes then had a cause of action against the now plaintiff for necessaries supplied for the use of the ship in respect of which Hayes was entitled to have the ship arrested and detained, maliciously, and without reasonable or probable cause, procured the registrar of the court to issue a warrant of arrest and detention, directed to the high bailiff of the court and others the bailiffs thereof, whereby they were commanded to arrest the ship, and to keep the same under safe arrest until they should receive further orders from the Court; and the defendants also maliciously, and without reasonable or probable cause, procured the warrant to be delivered to the bailiff to be executed, and caused the ship to be arrested by virtue of the warrant, and to be detained and kept a long time until the proceedings in the court in the matter of the arrest and detention were determined and the ship released; whereby the plaintiff lost the use of the ship, and was deprived of the benefits which would otherwise have accrued to him, and was much injured and damnified in his credit and otherwise.

Plea, not guilty.

Demurrer to the declaration and joinder.

Cohen, in support of the demurrer. There can be no doubt

that, in order to maintain the action, the proceedings must have terminated in the now plaintiff's favour: *Basebé* v. *Matthews* (1); and therefore it must appear on the face of the declaration that the proceedings have so terminated. But in the present case, all that is said is that the defendants caused the ship to be detained until the proceedings were determined and the ship released. That would be the case even if the proceedings were determined adversely to the now plaintiff, and he paid the debt and costs. All the precedents contain the express allegation that the proceedings terminated in the plaintiff's favour: see Bullen and Leake's Precedents, 3rd. ed., pp. 353–356. The Court will not go out of its way to imply an allegation, which may well have been omitted for some good reason.

Petheram, for the plaintiff, contended that the allegation in the declaration was sufficient, as it must be taken to mean that the proceedings were determined in favour of the now plaintiff. He refused to amend on the suggestion of the Court.

BLACKBURN, J. I regret there should be any difference of opinion on such a matter as this; but, for my own part, I have no hesitation in holding the declaration good. No doubt, to maintain the action, the proceedings in the county court must have been determined in the plaintiff's favour. The declaration only states that the proceedings were determined and the ship released; and it does not expressly state that the proceedings were determined in the plaintiff's favour; and it is argued that that allegation is consistent with the facts being that the suit terminated in the favour of the then plaintiff, and the debt and costs were paid by the defendant, and the ship was so released. We have no longer to look at pleadings as on special demurrer, and I think by reasonable intendment this declaration must be taken to mean that the proceedings were determined in the plaintiff's favour. If, however, the defendant thinks the declaration ambiguous, he should have gone to Chambers and got it amended as tending to embarrass, otherwise he ought to take issue by a plea of not guilty.

QUAIN, J. I am of opinion that the declaration is bad, and that judgment ought to be given for the defendants. It is said that by

(1) Law Rep. 2 C. P. 684.

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necessary or reasonable intendment the allegation must be taken to mean that the proceedings terminated in the present plaintiff's favour. The allegation is certainly at least ambiguous. I think it a great pity that the well-established form of pleading, which all the precedents shew, should have been departed from, and I cannot help thinking that there must have been some motive for the omission of the express allegation. Every precedent that I can find states not only that the proceedings terminated in the plaintiff's favour, but in distinct terms shews in what manner the proceedings were terminated. It is perfectly consistent with the allegation in this declaration that the proceedings had gone on to judgment in favour of the claimant, and on payment by the now plaintiff of the amount awarded against him the ship was released. And it does seem to me that, even on general demurrer, the very essence of the cause of action not having been distinctly alleged, the declaration is bad. If this were after verdict for the plaintiff, then I should admit, of course, that we ought to make every intendment that is necessary in order to support the verdict; but this is not so on demurrer, and the plaintiff, in my opinion, ought to have shewn distinctly how the proceedings had been determined.

ARCHIBALD, J. I am of opinion that the declaration is good. I quite agree that it is necessary to shew that the proceedings terminated in the plaintiff's favour. But I think that is implied in the present case by reasonable (not necessary) intendment, which is all that is required on general demurrer. I cannot come to any other conclusion than that the allegation means by reasonable intendment that the proceedings terminated in the plaintiff's favour. It seems a mere oversight that the allegation was omitted; and I think, on general demurrer, though not on special demurrer, that we must hold the declaration sufficient.

Judgment for the plaintiff.

Attorneys for plaintiff: *Guscotte, Wadham, & Daw.*
Attorney for defendant: *H. G. Stokes.*

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Nov. 17.

Costs of Prosecution for Felony to be paid by Person convicted—33 & 34 *Vict. c.* 23, *s.* 3—*Order as to Money found upon Prisoner*—*Intervening Bankruptcy.*

R. was arrested on a charge of felony, and money belonging to him was found upon him. On his conviction, an order was made, under 33 & 34 Vict. c. 23, s. 3, that the money be applied towards the costs of the prosecution. Between the arrest and conviction R. was adjudged bankrupt:—

Held, that the order was valid, notwithstanding the intervening bankruptcy.

RULE calling upon the justices of the Central Criminal Court to shew cause why a writ of certiorari should not issue to bring up a certain order made at the sessions holden on the 1st of May, 1873, whereby it was ordered that the costs of the prosecution of W. A. Roberts for forgery should be paid out of moneys found upon Roberts on his apprehension, as far as such moneys should extend.

It appeared from the affidavits that Roberts was apprehended on a charge of felonious forgery on the 4th of April, 1873, and money was then found upon him; he was tried and convicted at the May Sessions of the Central Criminal Court, and was sentenced to twelve years penal servitude. On the first day of the next sessions, to which all the business of the last preceding sessions is formally adjourned, the order in question was added to the judgment at the instance of the prosecution. Roberts had been adjudged a bankrupt on the 24th of April, and a trustee had been appointed on the 8th of May, at whose instance the present rule was obtained.

H. S. Giffard, Q.C., shewed cause. There can be no doubt that the order was rightly made under 33 & 34 Vict. c. 23, s. 3 (1); moreover, the proper remedy is by writ of error.

(1) 33 & 34 Vict. c. 23, s. 3: "It shall be lawful for any Court by which judgment shall be pronounced or recorded, upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, if to such Court it shall seem fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered by the Court to be made out of any moneys taken from such person on his apprehension. . . .

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THE COURT then called upon

Metcalfe, Q.C., in support of the rule. The property in the money had passed to the registrar or to the trustee in bankruptcy on the adjudication of the prisoner as a bankrupt on the 24th of April, and the Court had no power therefore to make the order on his conviction in May: *Whitaker* v. *Wisbey*. (1)

[BLACKBURN, J. That was a case of forfeiture at common law, and has no application to the present statute.]

BLACKBURN, J. I am of opinion that this rule must be discharged. It is immaterial to consider whether this is the only remedy, or whether the applicant has any other remedy. I wish also to guard against being supposed to decide that any money which may be taken upon a prisoner on his apprehension necessarily becomes liable to be applied towards the expenses of the prosecution when it clearly belongs to some third person. For instance, if a banker's clerk, having money of his employer which he is about to pay to another about him, is arrested and afterwards convicted of felony, no one would think that that money could be applied to the cost of the prosecution. So again, if the prisoner had, before his apprehension, committed an act of bankruptcy to which the subsequent adjudication of bankruptcy could relate, I say nothing as to what would have been the effect of that. The present case, on the facts before us, is simply that money belonging to the prisoner himself is found upon him on his apprehension; he is then after his apprehension adjudged bankrupt, no previous act of bankruptcy having taken place, and after that he is convicted and the order made. Sect. 3 shews that the money is liable to be applied to the costs of the prosecution, and the order can be made, notwithstanding that an assignment had been made by prisoner, or he had become bankrupt after his apprehension. The trustee in bankruptcy takes all the property of the prisoner, no doubt, but subject to all the rights of third persons, and this power given to the Court before whom the prisoner is convicted to make such an order as the present is a right of this nature; it is a right of lien or hold upon the money; so that it overrides the subsequent assignment by the adjudication of bankruptcy.

(1) 12 C. B. 44; 21 L. J. (C.P.) 116.

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QUAIN, J. I am of the same opinion. [The learned judge read s. 3, and stated the facts.] The money found upon the prisoner became subject to have an order made that it shall be applied to reimburse the costs of the prosecution. Mr. Metcalfe argued that the right, whatever it is, whether a lien or contingent right, was done away by the bankruptcy subsequent to the apprehension. But the simple answer is, the trustee takes the property subject to all liens or contingent liabilities. This power to hold the property and order it to be applied to the costs of the prosecution is such a lien or contingent liability; and the trustee only takes the money subject to this power.

Rule discharged with costs.

Attorneys for prosecution: *Humphreys & Morgan.*
Attorneys for trustee: *Lewis & Lewis.*

HODSOLL *v.* TAYLOR.

Nov. 24.

Action for Seduction, Interrogatories in.

In an action for the seduction of the plaintiff's daughter, interrogatories as to the defendant's pecuniary means cannot be administered to the defendant; but interrogatories as to whether the defendant had had sexual intercourse with the daughter, and had stated that he believed that she had not had such intercourse with any other man, are allowable.

ACTION for the seduction, by the defendant, of the plaintiff's daughter, Matilda Amelia Hodsoll.

The following interrogatories were proposed to be administered to the defendant:—

1—5. As to the defendant's age, yearly salary, and the interest which he took under his father's will.

6. Did you, during 1872 and up to August, 1873, reside at Turningham, Kent, in the house of Mr. Winder, and is not Mrs. Winder your mother?

7. Do you know Matilda Amelia Hodsoll, the daughter of the plaintiff, and when did you first make her acquaintance?

8. Did you not, during the years 1872 and 1873, frequently visit at the house of the plaintiff at Turningham, and did not

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M. A. Hodsoll, during the same period, reside at the house of the plaintiff, and during the same period visit at Mr. Winder's house?

9. Did you not very frequently, from November, 1872, and until August, 1873, have sexual intercourse with M. A. Hodsoll, the plaintiff's daughter, at the plaintiff's house, and while she so resided with the plaintiff, or at what other place or places, time or times?

10. Were you not informed by M. A. Hodsoll, many times previously to September, 1873, that she was pregnant by you; and did you not advise her to leave her father's house and go and reside in apartments, and did you not at the same time tell her that you would find her such apartments, and did you not in fact wholly neglect to do so?

11. Did you not know that M. A. Hodsoll was delivered of a child on or about the 22nd of September, 1873, and are you not the father of such child?

12. Did you not, on the 24th of September, 1873, receive a visit from Mr. C. W. Churchley, at the office of Messrs. Waite & Saul, and did you not then state to him, in the presence of other persons, that you had no reason whatever to believe that M. A. Hodsoll had been sexually intimate with any other man than yourself? And did you not there and then state that you would willingly keep and maintain the child of M. A. Hodsoll, and request him to apply to Mr. Winder, your step-father, on the subject of compensation to the plaintiff?

13. Do you not know that Mr. Gibson, the plaintiff's attorney, accordingly, on the 27th of September, 1873, applied to Mr. Winder on the subject referred to in the last paragraph; and have you not, in fact, seen the letter of that date?

14. Did you not, on or about the 4th of October, 1873, receive from Mr. Gibson a letter requesting you to make arrangements for maintenance of the child and for compensating the plaintiff for the seduction of his daughter?

15. Have you, in fact, made or proposed, or offered to make any arrangement whatsoever with the plaintiff, or any person on his behalf, for the maintenance of such child, or for the support of M. A. Hodsoll?

Martin, B., at Chambers, refused to allow the whole of these

interrogatories, but allowed, in substitution of the first five, the following interrogatory: "What are the present means of the defendant, and what property is he possessed of?"

Rules were obtained, by the defendant and plaintiff respectively, against the allowance of the substituted interrogatory, and the disallowance of the others.

Glyn, for the defendant. The first five interrogatories, or that substituted for them, are admissible. The defendant's means are just as relevant in an action of seduction as in an action for breach of promise of marriage.

[BLACKBURN, J. Clearly not so: the defendant's means go to show what is the plaintiff's loss by being deprived of the marriage.]

In *Andrews* v. *Askey* (1), Tindal, C.J., directed the jury that if they found for the plaintiff, "you will take into consideration the situation in life of the parties, and say what you think, under all the circumstances of the case, is a reasonable compensation to be given to the mother."

[BLACKBURN, J. The "situation in life." The means are pointedly omitted. The high position of the seducer may be an aggravation of the wrong.]

Whether the defendant is rich or poor is sure to come out at the trial. And all questions may be asked on interrogatory which could be asked vivâ voce at the trial: *Osborn* v. *London Dock Company*. (2)

[BLACKBURN, J. It probably would come out; that is one of the inevitable consequences of a trial at nisi prius; and that cannot be helped; but it is certainly no reason why we should allow an interrogatory as to a question, which, if asked and objected to at nisi prius, would most certainly not be allowed.]

As to the other interrogatories he was stopped by the Court.

James Mellor, for the plaintiff. The last series of interrogatories is inadmissible, as they, or most of them, call upon the defendant in effect, to admit the whole cause of action.

[QUAIN, J. It is surely allowable to the plaintiff to prove the whole cause of action out of the defendant's mouth.

BLACKBURN, J. In order to sustain that objection, it must be

(1) 8 C. & P. at pp. 9–10. (2) 10 Ex. at p. 702; 24 L. J. (Ex.) 140.

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shewn, first, that a question cannot be asked on interrogatory which will prove the whole cause of action; or if not, then, secondly, that the action for seduction is an exception.]

The twelfth interrogatory is evidently for the purpose of establishing the general good character of the daughter, and so to avoid the necessity of putting her into the witness-box.

[BLACKBURN, J. The object of interrogatories is to get facts admitted by the other side, and so to avoid the necessity of calling a number of witnesses to prove the facts which the answers to the interrogatories shew are not disputed.]

No interrogatories ought to be allowed the effect of which would be to deprive the defendant of his right to have the daughter in the witness-box and to cross-examine her.

[BLACKBURN, J. If we could see that such was the object and the probable result, we might not interfere with the discretion of the judge in disallowing the interrogatories; but if the case proceeds there can be no doubt that the plaintiff must call the daughter; her absence would endanger his prospect of damages.]

Glyn, in reply, referred to *Whateley* v. *Crowter*. (1)

[BLACKBURN, J. The 13th and 14th interrogatories are very doubtful.]

The plaintiff does not insist upon them.

BLACKBURN, J. I am clearly of opinion that the first interrogatory, asking the defendant in effect "How rich are you?" is not admissible, as in any way assisting the plaintiff's case. The jury, no doubt, would give higher damages against a rich man, and the defendant's means do in general in some way come out at the trial; that we cannot help. The true measure of damages is the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter; and in an action of tort it should be immaterial, as Lord Mansfield said, whether the damages came out of a deep pocket or not. This interrogatory, therefore, and those (1—5) for which it was substituted, cannot be allowed. The other interrogatories (with the exception of the 13th and 14th, which were very properly abandoned) must be allowed. They go to the very gist of the plaintiff's case, and

(1) 5 E. & B. 709; 25 L. J. (Q. B.) 163.

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are most decidedly relevant; and the only question is, therefore, whether the action for seduction is to be made an exception to the general rule. I can see no reason for so holding. No doubt there may be a mighty temptation to the defendant to tell a lie; but that is no legal reason against such questions being asked. If it were shewn that there were any improper motive in administering these interrogatories, if it was with the object, as it were, to abuse the process of court, by preventing the defendant having the opportunity of cross-examining, if he chooses, the plaintiff's daughter, we might pause before overruling the discretion of the judge at Chambers; but nothing of that sort is shewn here; and, for aught we know, if the defendant goes into court the plaintiff's daughter will, as a matter of course, be called, as she could not be kept back with any prospect of success. These interrogatories, therefore, being clearly relevant, must be allowed.

QUAIN, J. I am of the same opinion. The very object of a discovery is to obtain admissions from the defendant in aid of the plaintiff's case; and if the interrogatories go to this, which the last series of interrogatories clearly does, they must be allowed, unless there is some other objection to them. It is said that the plaintiff might prove his case aliunde, but this is the first time that I ever heard that that was an objection. Then it is said that this is an abuse of the process of the court; of course we must guard against this; but I can see nothing of the kind here. The interrogatories are perfectly relevant, and go directly to prove the plaintiff's case. Both rules must therefore be absolute, except as to the 13th and 14th interrogatories.

Rules absolute accordingly.

Attorneys for plaintiff: *Mackinson & Carpenter.*
Attorneys for defendant: *Hughes & Son.*

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THE MERSEY DOCKS AND HARBOUR BOARD, APPELLANTS;
THE OVERSEERS OF THE POOR OF THE PARISH OF LIVERPOOL, RESPONDENTS.

Poor-rate—Assessment of Public Docks—Tenant's Profits—6 & 7 Wm. 4, c. 96, s. 1.

The appellants are incorporated by certain Acts under which they hold docks and other property connected with the docks, and they are authorized to levy dock rates and duties from the owners of vessels and goods for the privilege of using the docks, and they are bound to apply the dock rates and all money received by them from the dock property according to the directions of the Acts. There are no shareholders, and no person derives any personal advantage or emolument whatsoever from the money received by the appellants; and all the rates are appropriated in payment of all expenses and charges of collecting the rates, and the several other purposes specified in the Acts, and the residue in repaying money borrowed. The appellants, having been rated to the poor-rate:—

Held, that the appellants were not entitled, in addition to the cost of collecting the rates, to a deduction for tenant's profits.

By a rate made for the relief of the poor of the parish of Liverpool, on the 27th of May, 1865, the appellants were assessed in the sum of 214,944*l.*, in respect of the annual value of certain of the dock estates within the parish which are vested in them.

The appellants appealed against the rate to the Liverpool Quarter Sessions, and the following case was agreed upon:—

1. The appellants are a corporation incorporated and regulated by and under "The Mersey Docks and Harbour Act, 1857," and "The Mersey Dock Acts Consolidation Act, 1858," and under these Acts hold docks and other property used in connection with and for the purposes of the docks on both sides of the River Mersey.

2. The first dock on the Lancashire side of the Mersey was made under the authority of 8 Anne, c. xii., whereby the mayor, aldermen, bailiffs, and common council of Liverpool were incorporated to make a dock (since filled up) on the south side of the town of Liverpool, and the duties leviable under that Act were not to be applied to any purposes except the building and repairing of the dock.

3. Other docks were subsequently made on the Lancashire side of the Mersey by the corporation of Liverpool, under the authority

of other Acts of Parliament, similarly limiting the application of the receipts from the docks, as was provided by the Act of 8 Anne, c. xii., until by 51 Geo. 3, c. cxliii., the mayor, aldermen, bailiffs, and common council were formed into a body corporate, and the docks and works on the Lancashire side of the river were vested in them, under the style of "The trustees of the Liverpool Docks."

4. The trustees so incorporated were empowered by the last-mentioned Act to levy certain rates, and when all charges and mortgages upon such rates should be paid off, they were required to lower and reduce the rates and duties thereby granted, so far as could be done in the state of the docks and works, so as to leave sufficient for all charges of management and collection of rates, and improving, repairing, and maintaining the docks and works so vested in them.

5. Subsequently other Acts, relating to the docks on the Lancashire side of the Mersey, were passed, in all twenty-two in number, and forming a series extending from 8 Anne, to 21 Vict.

6. Other docks were formed on the Cheshire side of the Mersey, at Birkenhead, under the authority of a series of fourteen Acts of Parliament, extending from 7 & 8 Vict. to 18 & 19 Vict., by which last-mentioned Act all the Birkenhead docks are vested in the corporation of Liverpool.

7. By s. 27 of the Act of 1867 (20 & 21 Vict. c. clxii.), it is provided that

"All such docks, lights, buoys, lands, buildings, and other property, both real and personal, situate at Liverpool, or elsewhere, as was held by or in trust for the trustees of Liverpool docks, under or in pursuance or for the purposes of any of the Acts mentioned in the first part of the schedule thereto annexed, should, upon and after the 1st of January, 1858, vest in the appellants, but subject to all charges and liabilities affecting the same."

8. By s. 49 of the same Act it is enacted that,

"Subject to the provisions of this Act the Appellants shall stand possessed of all the property, powers, rights, and privileges thereby transferred to them, upon the trusts and for the purposes upon and for which such property, powers, rights, and privileges were holden previous to the commencement of that Act."

9. By s. 50 of the same Act it is provided that

"From and after the 1st of January, 1858, all docks and works belonging to the board, and all docks and works that may hereafter belong to the board, shall be deemed to constitute one estate only, hereafter called 'The Mersey Dock

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Estate,' and a uniform system of management shall be adopted with respect to the whole of such Mersey Dock estate."

9. Sect. 56 enacts as follows:—

"The following rules shall be observed by the board with respect to the moneys received by them under this Act (that is to say):—

"(1.) The conservancy expenditure shall be defrayed out of the conservancy receipts.

"(2.) The pilotage expenditure shall be defrayed out of the pilotage receipts.

"(3.) No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure.

"(4.) No sum shall be payable in respect of docks by any vessel that does not use the same.

"(5.) Save as by this Act is provided no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purpose."

10. The dock estate at present consists of basins, docks, piers, jetties, graving docks, gridirons, wharfs, quays, landing stages, slips, stairs, river walls, dams, embankments, locks, gates, bridges, weirs, sluices, tunnels, cuts, channels, roads, railways, tramways, warehouses, sheds, offices, buildings, cranes, engines, machinery, and other works and conveniences affixed or appertaining to such basins and docks, or necessary for the working thereof: and the appellants are authorized to receive large sums of money under the name of dock rates and duties, by virtue of the Act of Parliament, from the owners of vessels and goods for the privilege of using the dock property.

11. The appellants are bound to apply the present dock rates and dues, and all other moneys received by them out of the dock estate, according to the directions of the Acts. There are no shareholders, and no member of the board or other person derives any personal advantage or emolument whatsoever from the execution of the dock estate, or has any interest in the dock estate, or in the moneys received by the appellants.

12. All the property vested in the appellants was acquired, and all the dock works, &c. were made and provided by them and their predecessors under the several Acts of Parliament, solely for the purpose of the dock business, and none of the property, docks, works, &c., are used for any other purposes whatsoever, and all the

money derived by the board from any part of the property is carried to the provisions of the Act of Parliament.

13. The docks and dock property were erected and purchased by borrowed money, and the dock estate is now subject to a large debt in respect thereof, the annual interest on which is paid by the appellants out of their income, as hereinafter mentioned.

14. The payment of this interest and the application of the income is provided for by s. 284 of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), by which it is enacted

"Subject to the provisions of the Mersey Docks and Harbour Act, 1857, all the moneys which shall be collected, levied, borrowed, and raised or received by the board under or by virtue of this Act, or the said Act, the application of which may not be otherwise expressly directed, shall be applied by the board in any order with respect to priority of such application as they shall deem expedient for the following purposes, some or all of them, that is to say, in payment of all expenses and charges of collecting rates:

"In payment from time to time of all interest accruing due on moneys borrowed and to be borrowed, and in payment of the Mersey Docks annuities hereinafter authorized to be granted, according to the respective priorities of such moneys and annuities, under this Act:

"In the construction of works authorized to be erected, established, and maintained by the board, and in supporting, maintaining, and repairing the same, and in carrying into execution all the provisions of this Act, and of the Mersey Docks and Harbour Act, 1857:

"And in the general management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Dock estate.

"And the residue or surplus of all such moneys which shall remain after such application thereof, as aforesaid, shall from time to time be applied in or towards the repayment of all principal moneys which shall have been borrowed by, or shall be due by the board, and in or towards the purchasing up and extinguishing of the Mersey Dock annuities in the manner hereinafter devised, until all such principal moneys shall have been repaid, and all Mersey Dock annuities shall have been purchased up and extinguished, and when by the means last mentioned all such principal moneys shall have been repaid, and all such dock annuities shall have been purchased up and extinguished, then and in such case the board shall and they are hereby required to lower and reduce the rates hereby authorized to be taken, so far as the same can be done in the then state of the docks and leaving sufficient for the payment of the expenses of collecting the rates and the supporting, maintenance, and repairing the docks, and the general management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Dock estate.

"And except as aforesaid, such moneys shall not be applied by the board for any other purpose whatsoever."

By s. 285, "Nothing in this Act contained shall alter and affect the question of the liability of any of the docks or works vested in the board to parochial or

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local rates, but the same shall in all respects be judged of and determined as if this Act had not been passed."

16. A sinking fund is provided by s. 4 of the "Mersey Docks and Harbour Act, 1859 (22 Vict. c. xx.), by which,

"In order to make provision for the repayment of the principal moneys which have already been borrowed, or which may hereafter be borrowed by the board, it is enacted that after payment in each year of all charges and expenses attending the collection of rates or incidental thereto, and after payment of all interest accruing due on moneys for the time being, forming a charge upon such rates and of the dock annuities authorized to be granted by the board, and after payment of all charges and expenses of supporting, maintaining, and repairing the works authorized to be erected and maintained by the board, and of the general management of the Mersey Docks estate, and of all reasonable expenses necessary for conducting, securing, improving, amending, maintaining, and protecting the same, the board shall every year, subsequent to the 24th of June, 1860, apply the surplus, if any, of the rates which shall remain in their hands after such payments, as aforesaid, to the extent of 100,000*l.*, or such less amount as the surplus shall be equal to, in and towards the repayment of the principal moneys which shall then be due and owing, on the security of the rates, and which shall then have become due and payable, and in the purchasing up and extinguishing of the Mersey Dock annuities which may be then existing, according to the respective priorities of such moneys and annuities, until all principal moneys due on the security of the rates shall have been purchased up and extinguished, and subject to the provisions herein contained, all rates and other moneys which shall be collected, levied, borrowed, and raised, or received under or by virtue of the Acts, or either of them, or of this Act, the application of which may not be otherwise expressly directed, shall and may be applied by the board according to the provisions for that purpose contained in s. 284 of the Mersey Docks Acts Consolidation Act, 1858."

17. There has usually been an annual surplus available for the sinking fund, which has never since 1861 amounted to 100,000*l.*

18. The corporation of Liverpool, before the passing of the Mersey Docks and Harbour Act, 1857 (20 & 21 Vict. c. clxii.), levied, under a franchise purchase by them many years ago, on goods imported into and exported from the port of Liverpool (with certain exceptions), certain dues called "town dues," and certain dues called "anchorage dues," on ships entering the port, and these dues were by s. 52 of the last-mentioned Act transferred to the appellants for a consideration, affixed by s. 40 at 1,500,000*l.*, and the appellants now derive an income from such dues, the surplus of which (after providing for interest on the sum of 1,500,000*l.*, and certain conservancy charges) goes into the general revenue account of the appellants.

19. To the annual surplus mentioned in paragraph 17, the part of the Dock estate within the parish of Liverpool, and which is the subject of the rate now appealed against, may be taken to contribute *l.*, and the said *l.* may be taken to be the net annual income derived from the property in question.

The appellants contend that they are entitled to deduct interest on their debt, as they are only allowed to receive the increased rates in order to pay off the interest, and the rates would have been immediately reduced if there were no interest to pay; that they are entitled to deduct tenant's profits, as would be done in any case of a trading body; that they are entitled not only to a deduction for ordinary repairs, but also a deduction for deterioration of works. They calculate the time when the different works will require renewal, and they claim to deduct every year a sum of money, which, put out to interest, would in the same time be sufficient to renew such works.

The respondents dispute the several contentions of the appellants above specified, and they further contend that the income from the town dues, after payment of interest on the sum of 1,500,000*l.* (the purchase-money of the dues) ought to be taken into account in the rate.

20. The respondents, thinking that the property was so exceptional in its nature that it is impossible to find a tenant and to estimate its rateable value in his hands in the usual way, have for the purpose of estimating the rateable value of the dock estate in the parish of Liverpool, taken the revenue of the board from dock rates and dock rents in the parish, not including town dues, as shewn by their accounts, and have deducted the proportional expense of working and management, ordinary repairs, and rates and taxes. In calculating the expenses of working and management, for the purpose of making the aforesaid deduction, a proportion of the expenses equal to the proportion which the revenue from the town dues bears to the general revenue of the Board has been set aside as chargeable to such dues. The balance has been deducted from the rateable income of the board. No allowance has been made for deterioration of works, beyond the ordinary repairs, nor for tenant's profits, such as are allowed in the case of an ordinary trading company, nor for interest on the bond debt.

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The questions for the opinion of the Court are:

1. Whether, under such a state of facts, the Mersey Dock Board are entitled to the deduction of tenant's profits, and

2. Whether the amount of such tenant's profits ought to be estimated at a fixed percentage, or ought to be left to the decision of the sessions.

3. Whether the appellants are entitled to any, and what allowance in respect of interest on their debt.

4. Whether the respondents are entitled to take into account the town dues.

5. Whether the appellants are entitled to a deduction for deterioration of works, on the principle mentioned in the 19th paragraph, or any other, or what principle.

6. Whether the principle adopted by the defendants and set out in the 20th paragraph is correct, and if not, in what respect it is incorrect.

Nov. 8. *Manisty, Q.C.* (*C. Crompton* with him,) for the appellants. The respondents, in estimating the rateable value of the docks, are not entitled to enhance the rateable value by taking into account the town dues. By paragraph 18 it is clear that those dues have no connection with the docks; they are dues levied on goods imported into and exported from the port of Liverpool, and on ships entering the port.

[BLACKBURN, J. If the town dues are received by virtue of the occupation of the land covered with water and works connected with the docks, I should, as at present advised, say that I do not see why they should not be taken into account, but if they are received as an independent and separate thing, and they are a matter in gross, they ought not to be included in the rateable value.]

The town dues are entirely separate and distinct from the dock dues. The main question is, is the principle of rating, as stated in paragraph 20, correct? The respondents have taken the actual income from the docks, not including the town dues: that, so far, is right. Then they have deducted the proportional expense of working and management: to that, also, there is no objection, provided that they have apportioned the expenses

correctly. They have deducted a proportion of the expenses equal to the proportion which the revenue from the town dues bears to the general revenue. This is incorrect. The mode adopted might be illustrated thus: Suppose the income from the docks is 2000*l.*, and the income from the town dues 1000*l.*, and the expenses of working and management 1000*l.*, the respondents have divided the expenses into three parts, apportioned two-thirds to dock expenses, and one-third to the expenses of managing the town dues. Now there are many expenses in the management of the docks that do not occur with respect to the town dues; for instance, expenses connected with the engineer's department are very heavy, and relate exclusively to the docks. The expenses of collecting the town dues and dock rates are comparatively small. The same officers collect both town dues and dock rates. The apportionment of expenses is therefore erroneous. Further, the principle laid down in paragraph 20 is wrong, because no allowance has been made for deterioration beyond ordinary repairs, nor for tenant's profits, nor for interest. Where works are of that character that ordinary repairs will not meet the ordinary expenditure, and there is deterioration, a sum for deterioration has always been allowed. Under 6 & 7 Wm. 4, c. 96, s. 1, the appellants are entitled to all such deductions as are necessary to maintain the premises in such a condition as to command the rent. They claim an allowance for ordinary repairs, and also for renewals of docks, gates, tramways, and rails; besides the ordinary repairs to these, the appellants have periodically to renew them at great expense. In *Reg.* v. *London, Brighton, and South Coast Ry. Co.* (1) a deduction was allowed from the gross profits in respect of average annual depreciation of the permanent way, although no sum was annually set apart for the purpose of repairing it. With regard to tenant's profits, it must be assumed that the hypothetical tenant would make a profit by the premises. The premises are to be rated at what a hypothetical tenant would give from year to year, and no such tenant would take the premises if he could not make a profit. *Reg.* v. *Southampton Dock Co.* (2) is precisely in point. There the Court held that tenant's profits was an item of deduction.

(1) 15 Q. B. 313; 20 L. J. (M.C.) 124. (2) 17 Q. B. 83; 20 L. J. (M.C.) 155.

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[BLACKBURN, J. I can understand that in a trading company the supposed tenant would only give that rent which would enable him after he had paid it to carry on the trade at a profit. But this case is like a lease of tithes, where no allowance would be made for tenant's profits, but a reasonable remuneration for the expense and trouble of collecting. These expenses the appellants have already had allowed.]

In *Hackney and Lamberhurst Tithe Commutation Rent-Charges* (1), Crompton, J., says: "The words 'tenant's profits' are not to be found in the Act, but in the common case of farms—in the taking of which the tenant naturally looks to the profits of successful agriculture as the recompense of his outlay and labour—such a sum may be properly included. In the case of a railway also, or other similar concern, the party taking would look to the profit to be made in carrying on the concern. In cases where the sum is fixed at a certain amount, no profits of the kind can be expected or exist, and we must look to what would be the real inducement to a tenant to take a demise of a rent-charge. Where the amount is certain to be paid, a moderate compensation for the trouble of getting in the money with what would be the fair allowance to meet expenses and contingent loss, would be the inducement to a tenant to take. In such cases where he made a profit by his labour as collector, that alone might be a sufficient inducement if he were guaranteed against bad debts and law expenses. It is difficult to see in such a case why a man might not take the tenancy on the same terms or nearly as the collection."

[BLACKBURN, J. That is against the appellants' argument.]

There is no case which lays down that the hypothetical tenant is not to have a sum allowed him for tenant's profits. With regard to the question of interest, it is admitted that the claim for an allowance of interest cannot be supported.

Sir J. B. Karslake, Q.C. (*Littler, Q.C.*, and *Batten*, with him), for the respondents. First, with regard to tenant's profits. It is true that in some cases tenant's profits are allowed, as in the case of a large commercial undertaking where personal skill is required to make the concern profitable, but where a sum certain is to be received, as in the case of tolls, and all the expenses of collecting

(2) E. B. & E. at p. 61; 27 L. J. (M.C.) at p. 247.

the tolls have been allowed, there a further sum for tenant's profits cannot be deducted. The other side must make out that in this case no hypothetical tenant would rent these premises without having a certain sum allowed for tenant's profits, but no such state of facts can be shewn. No personal skill is required in collecting the amount of a rent-charge or tolls, and the only deduction the appellants are entitled to is the expense of collection: that has been allowed. *Hackney and Lamberhurst Tithe Commutation Rent-Charges* (1) is an authority against the appellants' contention.

On the question of deterioration it must be admitted that there are cases in which a sum—beyond that allowed for repairs—for renewals or deterioration is sometimes allowed. Under the 6 & 7 Wm. 4, c. 96, the yearly tenant may be looked at as a person who, although he takes the premises from year to year, may possibly hold them for more than one year, and be entitled to a deduction, communibus annis, for repairs, but he is not entitled to a sinking fund besides. The appellants, according to paragraph 19, are expending, from year to year, such a sum as will keep the buildings and premises in a repaired and renewed state. While they get that sum allowed they require a further sum to be set aside on the assumption that they have merely repaired the premises, and that there are certain things attached to the premises which, at a future time, will require renewal. As to the expenses of management, the appellants have been allowed all that they are fairly entitled to. The dock dues and the town dues are not distinct things; they must be looked at as forming one fund, and then the principle of dividing the expenses rateably is correct. Lastly, the town dues ought to be taken into account in estimating the rateable value of the docks. The corporation of Liverpool sold these dues to the appellants, and they derive a large profit from them. That profit is carried to the general account. The consequence is, that if the appellants had not this profit from the town dues, the dock rates would be higher by that amount. Then ought the fact that the appellants do levy a lower rate to the extent of the profit on the town dues to be taken into consideration in deciding what a hypothetical tenant would give for the

(1) E. B. & E. 1; 27 L. J. (M.C.) 233.

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docks? It ought, and the rateable value ought to be enhanced by the amount of the profit on the town dues.

Manisty, Q.C., in reply. In ascertaining the rateable value of property a deduction for deterioration beyond a deduction for repairs is invariably allowed. In *Reg.* v. *Wells* (1), the Court said: "The second question submitted to us is whether any allowance should be made in respect of any contingent or future renewal of buildings or machinery. We are of opinion that such allowance ought to be made. Farm buildings and machinery are, by the effects of weather and of wear and tear, reducible to a state which will render them unworthy of repair, and necessitates their reconstruction. They cannot at length be kept up, but at an expense which renders it practically impossible, because not reasonably prudent to keep them up." It is on the principle laid down in this case that the appellants are entitled to the deduction for deterioration.

BLACKBURN, J. There are six questions asked us in this case. As to the first and second, which raise the question of tenant's profits, we will take time to consider our judgment. On the others we can give judgment at once. The third question is whether the appellants "are entitled to any, and what, allowance in respect of interest on their debt." Mr. Manisty very properly gave that up because it is untenable. We answer that question in the negative. The fourth question is, "Whether the respondents are entitled to take into account the town dues." That Sir John Karslake endeavoured to support, but without success. We need not say more than that they are not entitled to take into account the town dues. We are asked, fifthly, whether the appellants are entitled to a deduction for deterioration of works on the principle mentioned in the 19th paragraph, or on any and what principle. There is some difficulty here in understanding what is meant to be asked, and we can only say that the principle is, that the appellants are to be allowed, in the words of the Parochial Assessment Act, the probable average annual costs of repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. Whatever expenditure

(1) Law Rep. 2 Q. B. at p. 548.

therefore may be necessary to keep the docks in a proper condition, so as to enable the appellants to levy the rates, they are to have allowed them the probable average annual cost of such expenditure and deduct it in each year, although it has not been actually expended in that year: because the language of the Act is "the probable average annual cost." But the appellants are not entitled to calculate a probable average annual cost of expenditure over a period of years, and deduct that, plus the actual expenditure in a particular year: because what is actually expended in any year is taken into account in ascertaining the amount of the average. The probability is that the greater part of the expenses will in each year be the same, and it is only portions of them which will fluctuate, and in particular years cause the actual expenditure to be greater or less than the average. Lastly, there is the general question whether the principle set out in paragraph 20 is correct, and if not, in what respects is it incorrect. It is stated that "in calculating the expense of working and management for the purpose of making the deduction, a proportion of the expenses equal to the proportion which the revenue from the town dues bears to the general revenue of the board, has been set aside as chargeable to such dues, the balance has been deducted from the rateable income of the board." Now it is quite right that the expenses of collecting the town dues—a subject not rateable—should not be taken into account. A fair mode of dealing with the question would be to consider what were the expenses which the corporation of Liverpool incurred when the town dues belonged to them; and what, at that time, were the expenses the appellants incurred in collecting the dock rates. We think that the expenses incurred in collecting the dock dues and the town dues would be in the same proportion, as in all probability they would be collected by the same officers. The mode adopted in dividing these expenses is sufficiently accurate for all practical purposes, and it would be right to divide the expenses of collection rateably, according to the amounts of those dues. But there are the expenses incurred in dredging the docks and keeping them in order. These expenses relate exclusively to the docks; they ought not, therefore, to be apportioned, but the whole amount ought to be deducted. If the meaning of paragraph 20 is that the whole of the expenses, includ-

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ing the expenses incurred in dredging and keeping the docks in order, are divided proportionately, then the principle mentioned in paragraph 20 is wrong; but if it means that the expenses of what may be called "collection," which is common to both dock rates and town dues are divided proportionately, then the principle is fair and right.

QUAIN and ARCHIBALD, JJ., concurred.

Cur. adv. vult.

Nov. 19. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.), was delivered by

BLACKBURN, J. On the argument of this case, on the 8th of November in this term, the Court disposed of most of the questions submitted for judgment, but we took time to consider whether, under such a state of facts as is stated in the case, the Mersey Docks Board are entitled to a deduction for tenant's profits, and we are of opinion that they are not. The Parochial Assessment Act, 6 & 7 Wm. 4, c. 96, s. 1, enacts that all rates shall be made on an estimate of the net annual value of the several hereditaments rated thereunto; and that net annual value is thus defined: "That is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

Where the hereditaments, or hereditaments of a similar kind, are in practice actually let at a rent, the amount of which is ascertained by what has been called "the higgling of the market," the application of this definition is easy and simple.

Where the hereditaments are not in practice let the problem becomes more difficult. The facts and circumstances, which would be taken into consideration by those who in the case of a real tenancy do in the higgling of the market fix the rent, are to be taken into consideration, and on a view of all those the net annual value of the occupation is to be determined; and in many cases the amount that is made by the trade carried on by the occupier's

occupation, less an allowance for the profits which the tenant might elsewhere make by his trade, is an important element in the evidence of the annual value. In such a case as *Reg.* v. *Southampton Docks* (1) they were properly allowed; but it is not always so.

If the hereditaments are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation; but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business. For instance, to explain our meaning, there can be no doubt that the annual rent of a shop in Cheapside is higher than the annual rent of a similar shop in a back street; and that the reason why tenants give a higher rent is because of the superior facility for carrying on business there. But the rent and the rateable value of the shop are quite independent of the amount of the shopkeeper's actual gains. The rateable value is the same whether the tenant is a flourishing trader or is carrying on business at a loss. So, no doubt, in fixing the rent of chambers in one of the Inns of Court, the facility for carrying on the legal profession in them is an element, and an important one, but the actual income of the tenant is not. The chambers command no more rent when let to the Attorney General than they would do if let to a young barrister just called who does not as yet pay his expenses.

In the present case the value of the occupation depends entirely on the collection of the rates. Sect. 284 of the Mersey Docks Act, 1858 (2), requires that all the rates shall be appropriated in payment of all expenses and charges of collecting the rates, and several other purposes therein specified. If the premises were let to a tenant, it must be to a tenant subject to this Act, bound to hand over the rates received, after deducting the expenses and charges of collecting the rates to those purposes; and the persons

(1) 17 Q. B. 83; 20 L. J. (M.C.) 155. (2) See par. 14 of the case.

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paying the dock rates would have a right to object to any part of them being applied to pay tenant's profits, except in so far as an allowance for that might be included in the expenses and charges of collecting the rates.

But all the expenses and charges of collecting the rates actually incurred by the Mersey Dock Board, who are occupiers, are allowed for and deducted, and the contention for the board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary to the provisions of the Mersey Dock Act, levy in dock rates a sum, in addition to all the actual expenses of collection, for his own benefit.

In dealing with a somewhat analogous argument in the case of a tithe rent-charge, Crompton, J., in delivering the judgment of the Court, observes: "It is difficult to see in such a case why a man might not take the tenancy on the same terms, or nearly so, as the collection." (1)

In such a case as the present, where an actual demise on any terms would be impracticable, and where a demise on the terms that the tenant should receive a profit beyond the expenses of collection, would, if practicable, be illegal, we think no deduction should be made on account of tenant's profits.

Judgment accordingly.

Attorneys for appellants: *F. Venn & Son, for Squarey, Liverpool.*

Attorney for respondents: *J. B. Batten.*

(1) *Hackney and Lamberhurst Tithe Commutation Rent-Charges* (E. B. & E. at p. 61; 27 L. J. (M.C.), at p. 247).

[IN THE EXCHEQUER CHAMBER.]

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Nov. 28.

THE MERCHANT SHIPPING COMPANY, LIMITED, *v.* ARMITAGE AND OTHERS.

Ship and Shipping—Charterparty—Lump Freight—Loss of Part of Cargo by Fire without default of Shipowner.

By charterparty a ship was to load at Colombo, or Cochin, from the charterer's agents, a full and complete lading, and proceed to London, and discharge there, fire and other dangers of the sea excepted, a lump sum freight of 5000*l.*, to be paid after entire discharge and right delivery of the cargo, in cash, two months after the date of the ship's report inwards at the custom-house. Part of the cargo loaded in accordance with the charterparty was lost by fire, without any default of the master or crew, and the remainder was delivered in London:—

Held, that the shipowner was entitled under the charterparty to the full sum of 5000*l.*

Robinson v. *Knights* (Law Rep. 8 C. P. 465); *The Norway* (3 Moo. P. C. (N.S.) 245), approved.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiffs on a special case stated without pleadings. (1)

The action was brought to recover 1152*l.* 18*s.* 1*d.* and interest.

1. The plaintiffs are a company carrying on business as shipowners in the city of London, and were and are the owners of the ship *Clyde*, and the defendants are merchants carrying on business at Colombo and London.

2. On the 25th of January, 1872, the ship was lying in the harbour at Colombo, and upon that day the following charterparty was made and entered into by E. Shrewsbury, the master of the ship, on behalf of the plaintiffs, and the defendants:—

"Colombo, 25th of January, 1872. It is this day mutually agreed between Edward Shrewsbury, of the good ship or vessel called the *Clyde*, classed A 1 in Lloyd's, of the register tonnage of 1151 tons, or thereabouts, now lying in the harbour of Colombo, whereof he is the master, on the one part, and Armitage Brothers, of Colombo, merchants, on the other part, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed load here, or sail and proceed to

(1) See Law Rep. 8 C. P. 469, n.

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Cochin (orders to be given on or before the 29th instant), and if ordered to Cochin there load from the said charterers, or their agents, completing at Colombo or Tuticorin, if so required by charterers, a full and complete loading of legal merchandize, which full and complete loading the captain binds himself to receive on board, and properly stow, but not exceeding what she can reasonably stow and carry over and above her tackle, &c., and being so loaded shall therewith proceed to London into the East or West India Docks and discharge there as customary. The Act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted.

"A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the custom-house, or under discount at 5 per cent. per annum, or at the bank rate, if higher, at option of charterers' agents.

"Thirty-five working days are to be allowed the charterers (if the vessel be not sooner dispatched) for loading to commence and be continued from the time of the vessel having a clear hold, and ready for that purpose, the master giving charterers, or their agents, written notice twenty-four hours in advance to that effect, and the charterers to have the option of keeping the vessel fifteen working days on demurrage, paying 20*l.* per day, to be paid to the master day by day.

"All goods to be brought to the vessel and taken from alongside at the risk and expense of the freighters. The master to sign bills of lading at any rate of freight required without prejudice to this charterparty; but should the aggregate freight by bills of lading amount to less than the lump sum of 5000*l.* already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo. The owners of the ship to have an absolute lien on the cargo for the amount of freight stipulated for, except as to the captain's draft for disbursements and commission as before mentioned, in case of default. And it is hereby agreed that the charterers are to furnish cash for the disbursements of the

ship at port of loading at current rate of exchange, not exceeding 750*l.* free of interest, but subject to a commission of 2½ per cent., and cost of insurance, for the due appropriation of which the charterers are not to be held responsible, and for which and agency commission the master shall give his draft on the owners payable in London, at sixty days sight, and in the event of the bill not being accepted, or paid at maturity, the amount to be deducted from freight at settlement thereof, together with interest and cost of insurance. The ship to be consigned to owners' agents in London, and in case of the vessel having to put into the Mauritius, the vessel to be consigned to Blyth Brothers & Co., or to Thompson, Watson, & Co. at the Cape of Good Hope.

"The charterers to have the option of appointing their own stevedore at the expense of the master, but at not exceeding current rates; but the captain is not thereby relieved the responsibility regarding the proper stowage of his vessel. The captain and charterers to be at liberty to add any clause to this charterparty by mutual consent, without prejudice to this agreement.

"In default of performance of this agreement, it is hereby mutually agreed that the amount of freight herein agreed for is to be paid and taken as liquidated damages for such default."

3. In accordance with the orders of the defendants, the ship proceeded to the port of Cochin, and was there put up by the defendants as a general ship and loaded with a full and complete cargo, the property of various merchants, which cargo was shipped under several bills of lading, signed by the captain upon the orders of the defendants. The total amount of the bill of lading freight was estimated by the charterers at 4995*l.* 10*s.* 6*d.*, and was payable in London on delivery of the goods there.

4. The ship, with the cargo on board, sailed from the port of Cochin upon her voyage to London under the charterparty, and on the 2nd of May, 1872, the cargo was found to be on fire. The master of the ship, after attempting ineffectually to extinguish the fire at sea, put into Table Bay, which was the nearest port of refuge; and, after a survey, it was found expedient, in order to extinguish the fire, to scuttle the ship, as it was deemed that the fire could not be otherwise extinguished. The ship was scuttled in Table Bay, and the fire was thereby extinguished.

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5. After the fire had been extinguished the water was pumped out and the greater portion of the cargo was unladen, and as a large quantity thereof was greatly injured by fire and water, surveys, as customary, were called, and the surveyors pronounced a great part of the cargo unfit for re-shipment, and it was therefore ordered to be sold, and it was sold accordingly, and the proceeds thereof were paid into the hands of the plaintiffs, who have since accounted for the same to the owners of the goods sold.

6. The remainder of the cargo was re-laden on board the ship, and on the 9th of June, 1872, the ship having undergone some repairs, resumed her voyage to London with the remainder of the cargo on board, and with no other cargo, and arrived in port and proceeded to the West India Docks, and on the 12th of August, 1872, was reported inwards at the custom-house.

7. The bill of lading freights upon the cargo which arrived in London have been received by the plaintiffs and amount to the sum of 3482*l.* 7*s.* 10*d.*, and the defendants advanced to the master at Cochin the sum of 364*l.* 14*s.* 1*d.* for disbursements of the ship, making together the sum of 3847*l.* 1*s.* 11*d.*; but the defendants have not paid the plaintiffs the sum of 1152*l.* 18*s.* 1*d.*, being the balance of the lump freight of 5000*l.* mentioned in the charterparty, and refuse to pay the same to the plaintiffs.

8. The Court may draw inferences of fact.

The questions for the opinion of the Court are, whether the plaintiffs are entitled to payment by the defendants of the balance of the sum of 5000*l.* under the charterparty, after giving credit for the aggregate sum of 3847*l.* 1*s.* 11*d.*, which has been received by them on account thereof; and also whether the plaintiffs are entitled to interest.

W. Williams, Q.C. (*Cohen* with him), for the defendants. The judgment in the Court below proceeded on the authority of *Robinson* v. *Knights* (1), and *The Norway* (2), but those cases are distinguishable. In those cases a lump sum was to be paid for the hire of the ship, which was to be laden with the charterers' own goods; but in the present case the charter is a speculative one, by which the parties agree that, if the shipowners would put up

(1) Law Rep. 8 C. P. 465. (2) 3 Moo. P. C. (N.S.) 245.

their ship as a general ship, the charterers would guarantee them a freight of not less than 5000*l.* The sum of 5000*l.*, therefore, is not a rent for the hire of the ship, but it is a sum which the charterers have agreed shall be the minimum amount of freight earned. That this is the true construction of the charterparty appears from the several clauses in it. The charterers are to find 750*l.* for ship's disbursements, and the master is to give a draft on his owners for the amount; and when the ship is fully loaded, if the freight falls short of the 5000*l.*, then the difference is to be deducted from the disbursements, and the balance is to be paid in cash at Colombo. That shews that the bargain is, that the charterers are to give the shipowners the bill of lading freight, the shipowners taking the risk of the freight reaching the port of discharge. Moreover the freight is to be paid, after the entire discharge and right delivery of the cargo, in cash two months after the date of the ship's report inwards at the custom-house. That clause shews that the delivery of the whole cargo is a condition precedent to the payment of the 5000*l.* If no cargo is delivered, and the ship never reported at the custom-house, the 5000*l.* could not be recovered on this charterparty. The 5000*l.* cannot be apportioned, so that, if part of the cargo only is delivered and accepted by the consignee, the shipowner can only recover in assumpsit on a quantum meruit. [On this point he cited the following authorities: *Bright* v. *Cowper* (1); Abbott on Shipping, 10th ed. p. 329; Kent's Com. vol. iii. p. 291; Parsons on Shipping, vol. i. p. 293 (n. 4); *Post* v. *Robertson.* (2)]

Manisty, Q.C. (*Petheram* with him), for the plaintiffs, was not heard.

COLERIDGE, C.J. This is an appeal from a judgment of the Court of Queen's Bench, which was delivered in accordance with the decisions of *Robinson* v. *Knights* (3), and *The Norway.* (4) I do not find in the short report of this case in the Court of Queen's Bench (5), although the Court decided it simply on the authority of those cases, that they intimated any dissent from them.

Now, this case really is on all-fours with those two cases. It is

(1) 1 Brownl. 21.
(2) 1 John. Rep. (N. Y.) 23.
(3) Law Rep. 8 C. P. 465.
(4) 3 Moo. P. C. (N.S.) 245.
(5) Law Rep. 8 C. P. 469, n.

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true that the words of the charterparty in those cases are not identical with the present. In *Robinson* v. *Knights* (1), the contract was that the ship should proceed to Riga, to load a full cargo, should then proceed to London, and deliver the same on being paid freight as follows, a lump sum of 315*l*. There was the usual exceptions of sea risks, and the freight was to be paid in cash half on arrival, and the remainder on unloading and right delivery of cargo. Part of the cargo, loaded in accordance with the charterparty, was lost by perils of the sea, without any default of the master or crew. The question was, whether the lump sum of 315*l*. under those circumstances could be recovered, although some portion of the cargo had not been in point of fact delivered, but without default of the master or crew; and it was held that the shipowner was, on delivery of the remainder of the cargo, entitled to the full sum. In the case of *The Norway* (2), the contract was a little different. The ship was to be made ready and loaded at Liverpool with a cargo of salt, not exceeding 2200 tons, and therewith proceed to Calcutta, and after the discharge of the outward cargo re-load (or at freighter's option proceed to Rangoon, Akyab, or Bassein) a full and complete cargo of lawful merchandise, not exceeding what she could reasonably stow and carry. Then she was to go to certain ports and deliver the same agreeably to the bills of lading, and so end the voyage, with the ordinary sea exceptions; and then in consideration whereof and everything before mentioned, the freighter thereby promised and agreed to load and receive, or cause to be laden and received, in the manner and within the time therein mentioned for these purposes, and pay or cause to be paid as freight for the use and hire of the vessel, 11,250*l*. lump sum, if ordered to the United Kingdom, Havre, or Bordeaux; 11,250*l*., if ordered to Antwerp or Marseilles; the master guaranteeing to carry 3000 tons dead weight of cargo upon a draught of twenty-six feet of water, or to forfeit freight in proportion to deficiency. The vessel to be loaded, and so forth; and then payment was to be made in this way: "2000*l*. to be advanced on vessel clearing at Liverpool, subject to insurance only, say 1000*l*. by freighter's acceptance at four months, and 1000*l*. at six months; sufficient

(1) Law Rep. 8 C. P. 465. (2) 3 Moo. P. C. (N.S.) 245.

cash for ship's disbursement, not exceeding 2500*l.*, to be advanced at Calcutta; and the necessary disbursements, if ordered to the rice ports, subject to interest and insurance only, all at a current rate of exchange, for six months bills on London against the captain's receipts. Such advances to be made on account of chartered freight, and the balance as follows, viz.: one-third in cash on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the port of discharge by good approved bills payable in London, or cash equal to three months date from the delivery, if discharged in the United Kingdom, or in cash at current rate of exchange if discharged on the Continent, less three months' interest." And so forth. In that case the Judicial Committee appear to have arrived at a conclusion different in point of fact to that at which Dr. Lushington had arrived. (1) What they arrived at, in point of fact, was that there was a non-delivery of a certain part of the cargo; but that the non-delivery was not attributable to any degree of negligence or misconduct of the master; and they held that the whole sum had been earned, although a certain portion of the cargo had not been delivered at the end of the voyage, and that the contract was satisfied, and that, because the non-delivery arose without the negligence of the master; and, indeed, Lord Justice Knight Bruce intimates that if it had been otherwise, the Court would have been prepared to hold that the contract was duly fulfilled, and that the words of the charterparty, "true and final delivery of the cargo at port of discharge," had been sufficiently complied with.

Those are the two cases which we are called upon to review. Of course, the case of *Robinson* v. *Knights* (2) is not binding upon this Court unless we concur with it. The case of *The Norway* (3) is not binding upon this Court except so far as we agree with it. The Judicial Committee of the Privy Council is an independent tribunal, it is in no way a court of appeal from the courts in Westminster Hall, and the Courts in Westminister Hall always have held they are not bound to adopt the decisions of the Judicial Committee of the Privy Council, unless they are true expositions of the law contained in them. At the same time, I need hardly

(1) Brown. & Lush. 226. (2) Law Rep. 8 C. P. 465.
(3) 3 Moo. P. C. (N.S.) 245.

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say, by way of expressing my own individual opinion, that the judgments of the Judicial Committee of the Privy Council are entitled to the greatest weight, and, although not binding judgments, they are entitled to the greatest consideration, and ought to be viewed with the greatest respect by any court in this country which has to consider their authority.

Those are the cases we are called upon in this appeal to review, and the contract which we have to consider is not substantially dissimilar from the contracts which had to be considered in those cases. In this case the ship was to proceed to Cochin, and there load from the charterers, completing at Colombo or Tuticorin, if so required by charterers, a full and complete lading of merchandise, which full and complete lading the captain binds himself to receive on board and properly stow. Then there are the ordinary exceptions, including fire and other dangers of the sea; and then comes this with reference to the remuneration: "A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo, in cash, two months after date of the ship's report inwards at the Custom House, or under discount at 5 per cent. per annum, or at the Bank rate if higher, at option of charterers' agents." The facts are that on the way home some portion of the cargo got on fire, that the ship was taken to Table Bay on fire, and that, after making every effort to subdue the fire, it was necessary to scuttle the ship. The ship was scuttled and the fire was thereby put out. Some of the cargo was destroyed and some damaged, and, finally, such part of the cargo as remained was delivered; but a considerable part of the cargo was not delivered, and, therefore, the freight in the mere ordinary sense of the word "freight" had not been in point of fact earned upon such portion of the cargo as had been destroyed and was not delivered in this country; and it is also found that the loss happened without any negligence or misconduct on the part of the master or any one representing the owners of the ship. Under these circumstances we are asked to decide (the Court below having decided otherwise) that this lump sum freight of 5000*l.* has not become payable under the contract. For myself, I must say, if this case stood alone, and if *Robinson* v. *Knights* (1) and *The Norway* (2)

(1) Law Rep. 8 C. P. 465. (2) 3 Moo. P. C. (N.S.) 245.

had not been decided, I should have thought that the true construction of the contract was, that it meant to ascertain, as between the parties to it, the sum at which the freight to be earned by the ship on this voyage should be taken for the purposes of the contract; and the shipowners not choosing to run the risk of earning more or less, and the charterers being content to take the risk of earning so much, that the shipowners had let out, and the charterers had hired, the ship for this voyage at the sum of 5000*l.* called "lump sum freight," and substantially being freight, because it was a sum to be paid for the use of the ship in carrying cargo from the East to this country. To avoid all risk and all inconvenience between the parties to the contract, the lump sum was taken to represent that at which the one party was willing to hire and for which the other was willing to lend the ship for the stipulated voyage.

That being the interpretation of the contract, the question is, whether the non-delivery of a certain portion of the cargo interferes with the shipowners' right to this lump sum under this contract, whether in the terms of the contract "the cargo has been entirely discharged and rightly delivered."

If it were a matter entirely free from authority there might be some ground for saying that "entire discharge and right delivery of the cargo" meant the entire discharge and right delivery of the cargo originally put on board. But the fair and reasonable construction of it, regard being had to the contract being for a lump sum, seems to me to be that which the Courts have already put upon similar contracts,—that the cargo is entirely discharged and rightly delivered, if the whole of it not covered by any of the exceptions in the contract itself is delivered. Now, in this case, that which was not delivered and which was not discharged was not so delivered and was not so discharged by reason of perils within the exceptions of the very contract itself; and, therefore, according to these authorities, and according to the reason of the thing, it appears to me that the contract was complied with, and that the lump sum was earned, and that what has not been paid of the lump sum ought to be paid.

So the matter would stand if we had to deal with that portion of the contract alone. But we have had an exceedingly ingenious

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argument addressed to us in order to introduce a doubt into a portion of the contract which appears to be sufficiently plain. It is founded on the clause in the charterparty which provides that the master shall "sign bills of lading at any rate of freight required without prejudice to this charterparty; but should the aggregate freight by bills of lading amount to less than the lump sum of 5000*l.* already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo."

Now, Mr. Williams admits that the facts which have happened do not apply to the words in this stipulation; but, of course, if the facts that have happened do not test this case, he has a right in considering this stipulation to take as a test what might have happened; and he assumes this state of facts. The lump sum which the charterers undertake to secure is 5000*l.*; they stipulate to put as much cargo on board at least as will earn 5000*l.* Supposing, now, that the freight according to the bills of lading is 4000*l.*; that leaves 1000*l.* to be provided by the charterers according to the contract. That is to be provided in two ways: first, it is to be paid by the disbursements, and if the amount with which it is necessary to provide the master for disbursements does not bring the sum up to the 5000*l.*, the charterers undertake to pay him in cash at the port of loading, when the ship clears out, the balance left below 5000*l.*: thereby shewing, as he says, that the real construction of the contract is not a lump sum to be paid in lieu of freight, but a guarantee to provide 5000*l.* worth of freight; and what is not provided in the shape of actual freight was to be paid for in another way, leaving, therefore, what is provided in the way of freight subject to the ordinary incidents of freight. I am very far from saying that the construction put by Mr. Williams is not correct; but it does not appear to me to justify the conclusion he draws from it, or to interfere with the construction I have put upon the former part of the charterparty. Assuming Mr. Williams' construction of this particular portion of the charterparty to be correct, it appears to me to be no more than a mode of securing, in a particular event, the payment of the whole lump sum of 5000*l.*, the character of which has been already impressed

upon it by the earlier stipulation, with which this latter part of the contract cannot be permitted to interfere.

I am, therefore, of opinion that the judgment of the Court below should be affirmed.

BRAMWELL, B. I certainly at one time felt confident as to the right construction of this clause in the charterparty. The words are "the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo." That merely states at what rate you shall ascertain Colombo currency, and that the amount shall be paid in cash. I think, if that be so, it shows undoubtedly it was a sum of money to be paid at Colombo, and it was to be paid to the master; and if that is the right construction, it might mean that, if the bill of lading freight shall be less than the charterparty freight and the difference between the two shall be greater than the disbursements, then the balance between the disbursements and that difference shall be paid to the master. I must say, if the parties meant that, they have used words most inconvenient for that purpose, but there is some ground for Mr. Williams' construction in the expression which afterwards occurs, that the disbursements are to be drawn for (which must mean disbursements less deductions when there are any) by bills at sixty days sight. But I think it would be impossible for any Court of Law to hold that the words "and the balance, if any, to be paid" meant, "if, when the bill of lading freight has been deducted from the charterparty freight, the sum that shall remain after such deduction shall exceed the amount of disbursements, then the balance shall be paid in cash." I cannot think, however, that the solution of this puzzle is necessary to the decision of the case. The argument is: If it is construed in that way, then the shipowner always has, in the amount of disbursements, and in the amount of cash paid, and in the amount of bill of lading freight, his full 5000*l.*, that is to say, if the disbursements are 500*l.* and the bill of lading freight was 4000*l.* (that is together 4500*l.*), he is to be paid 500*l.* in cash. The shipowner, having thus got, in disbursements, cash (if any), and lien, this 5000*l.*, trusts to his lien, and not to the contract in the charterparty. That is the argument. But what is there, supposing this

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construction of the clause is right, to shew the shipowner has trusted to his lien alone? A case might very well happen in which the lien would not be sufficient; such a case, for instance, as the consignee not taking to the goods and becoming insolvent. This is an ordinary charterparty, and but for the difficulties that have been raised as to the lump sum, it would be a charterparty upon which the charterer would be clearly liable. It seems, therefore, to me that Mr. Williams has not made good the second step in his argument, even supposing him right as to the first.

Then he takes another objection and says that the whole delivery of the cargo was a condition precedent to the right to recover the 5000*l*. I do not know whether I have understood Mr. Williams' contention on this point. I do not know whether he says that if the whole cargo is not delivered there is no right to any lump sum, or whether he says there is some contrivance by which a proportion could be ascertained which would be a fair remuneration to the shipowner. Supposing a lump sum was to be paid, and that undoubtedly the charterer was to be liable for it, subject to the question of whether the entire delivery was a condition precedent, I cannot see, if it was a condition precedent, how the defendant would be liable to pay half the lump sum on half the cargo being delivered. Therefore Mr. Williams' argument must go to the extent that for the non-delivery of a single article the whole amount is lost. He relies on the words "that the ship shall take on board a full and complete cargo and shall proceed therewith to London and discharge it." That is the duty, but there is a qualification to that duty, "the act of God, restraints of princes and rulers, the Queen's enemies, fire," and so forth. Then it is said that it is only a qualification in diminution of the shipowner's liability. The clause is: "A lump sum freight of 5000*l*., to be paid after entire discharge and right delivery of the cargo, in cash, two months after the date of the ship's report inwards at the custom-house." Now, Mr. Williams says that, until the ship is discharged and there is a right delivery of the cargo, the lump sum is not due. It may possibly be that verbally he is right. If so, what is the meaning of "the cargo"? In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped, but which she is not bound to deliver, which the

shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her. Now there is a cogent argument in favour of this construction. Suppose that 5*l.* worth of these goods had been stolen by the crew, that would not be within the exceptions; then would it have been possible to have said that the whole lump sum was lost? Would not the common rule have applied? The defendants would have had to pay the freight and seek their remedy by a cross action. If that is so, is it not very odd that the shipowner is worse off because he is not subject to an action than if he had been subject to an action, that is to say, he is worse off because fire has caused the loss than he would have been if he had been owing to a depredation of the crew? I venture to think some interpretation must be put upon the clause to preclude the entire delivery of the whole cargo being a condition precedent.

Then Mr. Williams asks what would happen if nothing were delivered? I say, if that was so, the date from which payment was to be received would never have arrived, because it is a lump sum to be paid in cash after the entire discharge and right delivery of the cargo, two months after the date of the ship's report inwards at the custom-house. It must be after the right delivery of the cargo, which supposes there would be a right delivery of the cargo before it is payable, and if there was none delivered, I suppose the event would never happen upon which the lump sum was to be paid. It may be said, it is a very odd thing that, if the ship brought in safety an hundredth part of the cargo home, the entire 5000*l.* should be paid, whereas, if that hundredth part was lost, nothing should be paid. That, no doubt, may be a difficulty.

I believe that the case of *The Norway* (1), as my Lord has said, is absolutely undistinguishable from this. All the ingredients exist there that exist here. There is the same obligation to load a full and complete cargo, the same obligation to deliver, and the same statement that the freight is only payable on delivery of the cargo at the port of discharge. It is true that there the words used were, that it was for the use and hire of the ship. Suppose they had been left out, what difference would there have been between

(1) 3 Moo. P. C. (N.S.) 245.

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that case and this? No reliance is placed upon them in the judgment of the Court, and I think, when the principle of the decision is considered, those words are not of any consequence. Then there is the authority, in the Court of Common Pleas, of *Robinson* v. *Knights* (1), and there is the decision of the Court of Queen's Bench in this case, who intimate no dissatisfaction at the former decisions. I think, therefore, that the judgment of the Court below ought to be affirmed.

KEATING, J. I am of the same opinion. Assuming that Mr. Williams' construction of the clause in the charterparty relating to the payment of the disbursements is correct, I do not see how it meets the difficulty, because what he seeks to establish by means of his construction is, that the security of the freight is to be substituted—not to be a collateral security, but to be substituted—for the security of the contract. I cannot agree in that construction. What is the primâ facie meaning of the charterparty? The charterer agrees to pay a lump sum for the use of the ship for this particular voyage; but the shipowner wishes to be secure, and inasmuch as he has a cargo of goods, it is reasonable he should have the security of the goods; and therefore it is agreed he shall have the security of the goods, and the various provisions that are made in this disputed clause are mere provisions to guard against any interference with the security the shipowner is to have. But this affords no foundation for the argument that the shipowner is to have no remedy on the contract.

With reference to the authorities that have been cited, I quite agree with what my Lord Chief Justice and my Brother Bramwell have said.

CLEASBY, B. Undoubtedly in this case the shipowner looks principally to be paid by means of his lien upon the cargo. But I never heard it suggested that, because he does rely mainly upon the security he has by means of the cargo, therefore there is no person liable on the contract in the charterparty.

Now, in this case, in order to give the shipowner full security for the 5000*l.*, various provisions are introduced into the charterparty.

(1) Law Rep. 8 C. P. 465.

There is to be an advance of 750*l.*, and a bill is to be given in respect of it. But the bill which is to be drawn is not to be for the full amount of the advances, unless the bill of lading freight amounts to 5000*l.* Supposing the bill of lading freight amounts to 4500*l.*, you are to deduct the 500*l.* from the 750*l.*, and the bill will be only for 250*l.* The balance is provided for in that way; but then the balance may be the other way, in which case the balance is to be paid in cash, and I confess I do not feel the difficulty which my Brother Bramwell does in applying these words, "and the balance, if any."

With respect to the other point, in his judgment in *Robinson* v. *Knights* (1), my Brother Brett asks a very pertinent question; he says, "It was argued that the freight was to be paid only on the delivery of the cargo at the port of discharge, but the question is, what cargo?" The words of the present charterparty are not "upon the delivery of the entire cargo;" although the word "entire" is made use of, it is "the entire and complete delivery of the cargo." As to this I am satisfied with the reasons already given, and with the authorities that have been cited, and I think the judgment of the Court below must be affirmed.

GROVE, J. I am of the same opinion. I cannot see that Mr. Williams' argument stopped short of the proposition that, if the entire cargo as laden was not delivered, this clause would so operate that nothing in fact would be earned. It is true that he said proceedings might be taken upon a quantum meruit; but I do not gather from the charterparty anything to satisfy me that this could be done consistently with the existence of this contract. Then the clause does not necessarily import the meaning put upon it by Mr. Williams, for to have that meaning it must not only be altered to "after discharge and delivery of the entire cargo," but to "the entire cargo as laden." Why should the Court put a forced construction upon those words, which do not necessarily import the delivery of the entire cargo, instead of the construction that the parties hired the ship for 5000*l.*; and why should they put the person so bargaining in a worse position than he would be in under an ordinary contract?

(1) Law Rep. 8 C. P. at p. 468.

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With regard to the other clauses, they have been commented on by the Court, and I confess that I can find nothing in the words which, without considerable addition, could support Mr. Williams' argument. I am of opinion therefore that the judgment of the Court below should be affirmed.

DENMAN, J., and POLLOCK, B., concurred.

Manisty, Q.C. The Court below gave the plaintiffs judgment for the interest on the sum recovered. The plaintiffs are entitled to interest, as the freight is a sum certain payable on a certain day.

W. Williams, Q.C. The plaintiffs can only be entitled to interest under 3 & 4 Wm. 4, c. 42, and that statute does not apply, as the sum in respect of which it is claimed is payable at a time not certain.

Cur. adv. vult.

Nov. 29. COLERIDGE, C.J. We are of opinion that the plaintiffs are not entitled to judgment for the interest. We do not think that the principal sum is payable at a time certain. The judgment of the Court below will be affirmed as to the principal sum, but reversed so far as it relates to the interest.

Judgment accordingly.

Attorney for plaintiffs: *E. Saxton.*

Attorneys for defendants: *Thomas & Hollams.*

Nov. 24.

PURKIS *v.* FLOWER.

County Court—Admiralty Jurisdiction—Damage to Ship by Barge—3 *&* 4 *Vict. c.* 65, *s.* 6—31 *&* 32 *Vict. c.* 71, *s.* 3; 32 *&* 33 *Vict. c.* 51, *s.* 4.

Damage was done to a ship by a barge within the body of a county:—

Held, on the authority of *The Sarah* (Lush, 549), that the Admiralty Court would have had jurisdiction at common law in respect of such damage if done on the high seas; that, by 3 & 4 Vict. c. 65, s. 6, that Court was given jurisdiction in respect of the same damage done within the body of a county, as it had before jurisdiction in respect of when done on the high seas; and that therefore a county court having Admiralty jurisdiction had jurisdiction over the case under the County Courts Admiralty Jurisdiction Acts.

RULE calling upon the plaintiff to shew cause why the master should not be at liberty to review his taxation of costs and dis-

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allow the plaintiff's costs, on the ground that the action was improperly brought in a superior court.

The action was for negligence in the management of the defendant's barge, whereby damage was done to the plaintiff's ship. The facts occured within the body of a county, not on the high seas. The defendant allowed judgment to go by default for want of a plea. And upon a writ of inquiry the plaintiff's damages were assessed at 15*l*. The master on taxation allowed the plaintiff his costs.

W. G. F. Phillimore, shewed cause. (1) Apart from modern statutes the Admiralty Court would have had no jurisdiction over this case, inasmuch as the collision was within the body of a county. And the only enabling statute on this subject, 3 & 4 Vict. c. 65, s. 6 (2), must be read as applying only to damage done by a ship, and not by anything else; for at the time that Act was passed proceedings in personam were practically obsolete, and it would be absurd to proceed in rem against such a thing as a cannon for instance: see per Brett, J., *Everard* v. *Kendall*. (3) And if the Admiralty Court has not jurisdiction, neither has the county court: *The Dowse* (4); *Everard* v. *Kendall* (5); *Simpson* v.

(1) In the Bail Court, before Lush and Archibald, JJ.

(2) By 3 & 4 Vict. c. 65, s. 6: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever, in the nature of salvage for services rendered to, or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered, or damage received, or necessaries furnished in respect of which such claim is made."

By 31 & 32 Vict. c. 71, s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes)

3. As to any claim for damage to cargo or damage by collision, any cause in which the amount claimed does not exceed three hundred pounds."

By 32 & 33 Vict. c. 51, s. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

(3) Law Rep. 5 C. P. at pp. 430, 434.

(4) Law Rep. 3 A. & E. 135.

(5) Law Rep. 5 C. P. 428.

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Blues. (1) *The Cargo ex Argos* (2), is distinguishable, as it was decided on a different section; so is *The Industrie.* (3)

R. E. Webster, in support of the rule. The Admiralty Court had at common law jurisdiction over such a collision on the high seas: *The Sarah.* (4) And by 3 & 4 Vict. c. 65, s. 6, whatever that Court had jurisdiction over, if happening on the high seas, it was given jurisdiction over though within the body of a county. And therefore the county court had jurisdiction over this case under the County Courts Admiralty Acts. But even if the Admiralty Court has not jurisdiction over such a case the county court has. The words of the Acts giving them jurisdiction are unqualified, and the decision in *Simpson* v. *Blues* (1), which limited the county court jurisdiction to cases within that of the Admiralty, has been disapproved of in *The Cargo ex Argos.* (2) [He also cited *The Bilbao.* (5)]

LUSH, J. It is unnecessary to consider the question whether the County Courts Admiralty Jurisdiction Acts give the county court jurisdiction in any case in which the Admiralty Court had not jurisdiction. I am clearly of opinion, from the case of *The Sarah* (4) that, under 3 & 4 Vict. c. 65, s. 6, the Admiralty Court would have had jurisdiction in this case.

ARCHIBALD, J. I am of the same opinion. The moment it is shewn, as it is by the case of *The Sarah* (4), that the Admiralty Court would at common law have had jurisdiction over such a case on the high seas, the case is clear. It is unnecessary to decide between the conflicting views of the Privy Council and the Common Pleas.

Rule absolute.

Attorneys for plaintiff: *Dyke & Stokes.*
Attorney for defendant: *J. R. Farnfield.*

(1) Law Rep. 7 C. P. 290.
(2) 42 L. J. (Adm.) 49.
(3) Law Rep. 3 A. & E. 330.
(4) Lush. 549.
(5) Lush. 149.

END OF MICHAELMAS TERM, 1873.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXVII VICTORIA.

IN THE MATTER OF AN ARBITRATION BETWEEN DENTON AND OTHERS AND STRONG.

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Jan. 19.

Arbitration—Enlargement of Time by a Judge for making an Award—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 15.

By a submission in writing the award was to be made within a month or within such further time (not exceeding three months from the date of the submission) as the arbitrator should enlarge the time to. The award not having been made within the three months:—

Held, that a judge, in his discretion, had power to enlarge the time under s. 15 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125.)

By an agreement in writing dated the 22nd of March, 1872, certain matters in difference were referred by the parties to an arbitrator, and the agreement provided that the arbitrator "shall make his award on or before some day in the month of April, or on or before any other day (*not exceeding three months from the date of this agreement*), to which the arbitrator shall, by any writing signed by him and endorsed on the agreement, enlarge the time for making his award."

The hearing of the reference was concluded on the 11th of May, 1872; and on the 15th of November, 1873, no award having been then made, the submission was made a rule of Court; and on

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the 26th of November a judge's order was obtained by one of the parties, by which it was ordered "that the time for making the award be extended for two months."

Gully, for another of the parties, moved to set the order aside, on the ground that the judge had no power to make the order beyond the time limited in the agreement. *Lord* v. *Lee* (1) is primâ facie against the application; but there no time for making the award was limited by the parties; and no case has gone so far as to decide that the time can be enlarged where the parties have expressly agreed as in the present case.

BLACKBURN, J. The arbitrator could not have enlarged the time; but there can be no doubt that a judge, in his discretion, can enlarge the time at any time, under s. 15 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), although the parties have put a limit to the time.

PER CURIAM (Blackburn, Quain, and Archibald, JJ.)

Rule refused.

Attorneys for applicant: *Chester, Urquhart, & Co., for Norris & Sons, Liverpool.*

Jan. 27.

RAEBURN *v.* ANDREWS.

Practice—Security for Costs—Plaintiff Resident in Scotland—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 54).

Since the passing of the Judgments Extension Acts, 1868 (31 & 32 Vict. c. 54), a plaintiff residing in Scotland is not required to find security for costs.

AN action was brought by the plaintiff, who was resident in Scotland, against the defendant.

The defendant took out a summons calling on the plaintiff to shew cause why all proceedings should not be stayed until the plaintiff should have given security for costs.

At the hearing before the master he dismissed the summons. The defendant appealed from the master's decision, and Martin, B., referred the matter to the Court.

(1) Law Rep. 3 Q. B. 404.

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Lanyon moved for a rule in the terms of the summons. The plaintiff is resident in Scotland, and it is quite clear that, but for the Judgments Extension Act, 1868 (1), the defendant would be entitled to a stay of proceedings till he gave security for costs. The reason is, that if a person residing without the jurisdiction sues a person within the jurisdiction, the latter is placed at a disadvantage, for, in the event of his succeeding, there is no process by which he can directly enforce his right to costs: Chitty's Practice, p. 1349, 10th ed.; *Pray* v. *Edie* (2); *Fitzgerald* v. *Whitmore* (3); *Limerick and Waterford Ry. Co.* v. *Fraser.* (4) Then can it be said that the law is altered by the passing of the Judgments Extension Act, 1868? In Day's Common Law Procedure Acts, p. 419, it is laid

(1) 31 & 32 Vict. c. 54, s. 2: "Where judgment shall hereafter be obtained or entered up in any of the courts of Queen's Bench, Common Pleas, or Exchequer, at Westminster or Dublin respectively, for any debt, damages or costs, on production at the office kept in Edinburgh for the registration of deeds, bonds, protests, and other writs registered in the books of council and session of a certificate of such judgment in one of the forms contained in the schedule hereto annexed, as the case may be, purporting to be signed by the proper officer of the Court where such judgment has been obtained or entered up, such certificate shall be registered in a book to be kept for that purpose, and to be called 'The register for English and Irish Judgments,' in like manner as a bond executed according to the law of Scotland, with a clause of registration for execution therein contained; and every certificate so registered shall, from the date of such registration, be of the same force and effect as a decreet of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate, as if the judgment of which it is a certificate had been a decreet originally pronounced in the Court of Session on the date of such registration as aforesaid, and all the reasonable costs, charges, and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment: provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to and leave obtained from the Lord Ordinary on the bills."

Sect. 5: "It shall not be necessary for any plaintiff in any of the aforesaid Courts in England, resident in Ireland or Scotland, or any plaintiff in any of the aforesaid Courts in Ireland, resident in England or Scotland, in any proceeding had and taken on such certificate, to find security for costs in respect of such residence, unless on special grounds a judge or the Court shall otherwise order; nor shall it be necessary for any party to such proceeding in Scotland, resident in England or Ireland, to sist a mandatory or otherwise to find security for expenses in respect of such residence, unless on special grounds the Court shall otherwise order.

(2) 1 T. R. 267.

(3) 1 T. R. 362.

(4) 4 Bing. 394.

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down: "By the Judgments Extension Act, 1868, a plaintiff resident in Ireland or Scotland is now relieved of the necessity of finding security for costs by reason of such residence, and unless on special grounds a judge should order otherwise." But the rule of practice is not affected by the Judgments Extension Act, 1868. Sect. 5 enacts that no security shall be required in any proceeding taken on the certificate; it therefore leaves the old practice as to security unchanged in other respects. Expressio unius est exclusio alterius.

W. A. Lewis appeared to shew cause in the first instance, but was not called upon.

BLACKBURN, J. I think that there ought to be no rule. When we look at the origin of the practice of calling on a plaintiff resident abroad to give security for costs, as established in *Pray* v. *Edie* (1), the point becomes quite clear. In that case, the plaintiff being a foreigner residing abroad, the Court stayed proceedings till he gave security for costs, and Buller, J., said: "for this reason, that if a verdict be given against the plaintiff he is not within the reach of our law so as to have process served upon him for the costs." The same point was afterwards, for the same reasons, decided in *Fitzgerald* v. *Whitmore* (2), in the case of a plaintiff residing in Ireland, and the rule was afterwards extended to a plaintiff resident in Scotland. But since the passing of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), that reason has completely ceased. The effect of that enactment is that when a judgment has been obtained in England a certificate of such judgment can be registered in the proper office in Scotland, and the Court in Scotland can issue process on such judgment. It is true that the process in Scotland may perhaps be not like the process of our courts, but we must take it that it is as effective as our own. In Ireland if the writ of ca. sa. be not taken away an execution under this Act would be more effective than in England. The reason, therefore, for compelling a plaintiff resident in Scotland to give security for costs having ceased, this rule must be refused.

An argument was founded on s. 5 of 31 & 32 Vict. c. 54. It was said that, that section having expressly enacted that there shall be no security for costs on proceedings taken on the certificate,

(1) 1 T. R. 267. (2) 1 T. R. 362.

and having made no similar provision with regard to security for costs in the case of persons resident in Ireland and Scotland, it was the intention of the legislature that the old practice in this respect should continue; but we do not think that argument tenable. That provision was inserted in s. 5 from excess of caution.

QUAIN, J. I am of the same opinion. The reason that a plaintiff resident abroad was compelled to give security for costs was because he was not in reach of our law to have process served on him, in the event of the defendant obtaining a judgment. That reason having now ceased, the old rule is abolished.

With regard to the argument on s. 5, the proceeding to be taken on the certificate is merely to register it, and the framer of the Act thought it would require some special provision to deprive the defendant of his security for costs. But probably it was introduced to meet the case mentioned in the proviso at the end of s. 1, where some costs may have to be incurred in obtaining the leave of the Court or judge before the certificate can be registered.

ARCHIBALD, J. I am also of the same opinion. The rule requiring security for costs to be given by a plaintiff has but recently grown into practice. The history of it is given in Tidd's Practice, vol. i. p. 534: "It was not formerly usual to require security for costs where the plaintiff resided abroad, . . . for it was considered that such a proceeding might have affected trade by excluding foreigners from our courts, and would be a means of clogging justice. But now, although a plaintiff is not compellable to give security for costs, merely as a foreigner, if he reside in this country, yet whether he be a foreigner or native, if he reside abroad out of the reach of the process of the Court, the proceedings may in general be stayed . . . till security be given for the payment of costs. And upon this ground proceedings have been stayed where the plaintiff has been resident in Scotland or Ireland." The Judgments Extension Act, 1868, now gives an effectual remedy to a defendant for his costs. The reason for requiring such security ceases, and therefore there is no necessity to compel a plaintiff to give security. If s. 5 is read with the proviso at the end of s. 1, it is in favour of the same view, for the intention of the legislature is

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against requiring security for costs even in that case. I agree that the plaintiff ought not to be required to give security, and the rule ought to be refused.

Rule refused.

Attorneys for plaintiff: *Lewis, Munns, & Lewis.*
Attorneys for defendant: *Holland, Son, & Co.*

Jan. 28.

SEARLE *v.* LAVERICK.

Bailee for Hire—Livery Stable Keeper, Liability of, for Care of Carriage of Customer—Fall of Coach-house.

Where a livery stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, the case comes within the second class of the fifth sort of bailment mentioned by Holt, C.J., in *Coggs* v. *Bernard* (2 Ld. Raym. at pp. 917–918), viz. a delivery to carry or otherwise manage for reward, to a private person, not exercising a public employment; and he is bound to take reasonable care.

The obligation, to take reasonable care of the thing intrusted to a bailee of this class, involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe.

The fact that the building has been erected for the bailee on his own ground makes no difference in his liability.

The plaintiff brought his horses and two carriages to defendant, a livery stable keeper; the carriages were placed under a shed on defendant's premises, a charge being made by defendant in respect of each. The shed had just been erected, the upper part being still in the hands of workmen. Defendant had employed a builder to erect the shed for him, as an independent contractor not as defendant's servant, and he was a competent and proper person to be so employed. The shed was blown down by a high wind, defendant being ignorant of any defect in it, and the carriages were injured; upon which plaintiff brought an action against defendant. At the trial, the above facts having been admitted, the judge rejected evidence to prove that the fall of the shed was owing to it being unskilfully built through the negligence of the contractor and his men; and he nonsuited the plaintiff, ruling that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to take ordinary care in the keeping of the plaintiff's carriages, and that if he had exercised in the employment of the builder such care as an ordinary careful man would use, he was not liable for damage caused by the carelessness of the builder of which he, defendant, had no notice:—

Held, that the nonsuit and ruling were right.

Readhead v. *Midland Ry. Co.* (Law Rep. 4 Q. B. 379), and *Francis* v. *Cockrell* (Law Rep. 5 Q. B. 184, 501), distinguished.

DECLARATION, that in consideration of plaintiff having delivered to defendant certain carriages to be safely kept and taken care of

by defendant for plaintiff, for reward to defendant, defendant promised to safely keep and take care of the carriages. Breach, that defendant did not safely keep and take care of the carriages while they were in his keeping, whereby they were damaged.

Second count, that plaintiff delivered to defendant certain carriages to be kept in a fit and proper carriage-house or building for that purpose, and to be taken due care of by defendant for reward to him, that defendant promised so to keep the carriages in a fit and proper building. Breach, that defendant did not so keep the carriages, but kept them in a dangerous and insufficient shed or building, whereby the roof fell down and damaged the carriages.

Pleas: 1st. That defendant did not promise as alleged. 2nd. That plaintiff did not deliver nor defendant receive the carriages on the terms alleged. 3rd. A denial of the wrongful acts and breaches alleged.

Issue taken and joined.

At the trial before Pollock, B., at the Durham Spring Assizes, 1873, the plaintiff was nonsuited.

A rule was afterwards obtained for a new trial, on the ground of misdirection; and that on the facts opened and proposed to be proved there was evidence that the defendant had failed in his duty and was guilty of negligence as bailee of the property.

Nov. 21, 1873. *Holker Q.C.*, and *Shield*, shewed cause.

C. Russell, Q.C., and *Lewers*, supported the rule.

The facts, course of trial, and direction of the learned judge, and the arguments of counsel, are fully set out in the judgment of the Court.

In addition to the cases noticed in the judgment, the following authorities were cited by counsel: Story on Bailments, ss. 4, 5, 6, and 442; *Smith* v. *Marrable* (1); *Sutton* v. *Temple* (2); *Erskine* v. *Adeane* (3); *Pickard* v. *Smith*. (4)

Cur. adv. vult.

Jan. 28, 1874. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.), was delivered by

BLACKBURN, J. This was a rule obtained to set aside a nonsuit

(1) 11 M. & W. 5.
(2) 12 M. & W. 52, 64.
(3) Law Rep. 8 Ch. Ap. 756.
(4) 10 C. B. (N.S.) 470.

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and have a new trial, against which cause was shewn in the last term before my Brothers Mellor and Lush and myself.

The trial took place at Durham, before my Brother Pollock. The action was brought to recover damages for an injury to the plaintiff's carriages, occasioned by the fall of a building below which they were placed; and the question in the cause was whether the defendant was responsible for the injury so occasioned.

It appears from the learned judge's notes, that the defendant was a livery stable keeper, and that he had contracted with a builder (not a servant of the defendant, but an independent contractor), to erect on part of his yard a building, of which the lower part was to be a shed intended for the reception of carriages, and the upper part to be used for other purposes.

The plaintiff brought his horses and two carriages to the defendant about the end of September, at which time the building was not completed, so far as to permit both carriages to be placed under it. One of the plaintiff's carriages was housed in it, the other stood at first in the open yard. The plaintiff, finding this to be the case, complained at some time in October, and was told in substance that, as soon as the shed was complete, the carriage should be put under cover, and that till then no charge would be made for it. The second carriage was placed under the shed in the last week in October, and from that time a charge was made for both carriages, until the misfortune happened which I will now mention. In November, at a time when the lower part of the building had been complete, but whilst the contractor's workmen were still in the upper part of it, the building was blown down by a high wind, and the carriages were injured.

It was not disputed that the builder was one whom a careful and prudent person might trust, and that the defendant had no notice of any negligence on the contractor's part; but the plaintiff's counsel offered to prove that, owing to the neglect of the contractor and his workmen, the building was in fact unskilfully built and unsafe, and that this was the cause of the fall. The learned judge then, as stated in his note, ruled "that defendant's liability is that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the plaintiff's carriages, and that, if in causing the shed to be built he

did all that he did, by employing a builder and otherwise, with such care as an ordinary careful man would use therein, he would be protected, and would be exempt from liability for an event which was caused by the careless or improper conduct of the builder of which the defendant had no notice."

On this the plaintiff's counsel declined to give evidence as to the shed having been improperly built by the builder, the defendant having no knowledge thereof; and the plaintiff was thereupon nonsuited.

The plaintiff's counsel, having raised his point, did right in submitting, at Nisi Prius, to the ruling of the judge, and he is not precluded thereby from questioning it afterwards. And if proof that the building was unskilfully erected by the builder or his workmen, though the defendant had no knowledge of it, would have established the defendant's liability, the plaintiff is entitled to a new trial, in order that he may have an opportunity of bringing forward the evidence which, in submission to the judge's ruling, he abstained from giving at the former trial.

The question, therefore, which we have to determine is, what was the extent of the obligation of the defendant as to the security of the shed in which he lodged the plaintiff's carriages. We think it is beyond question that he did come under some obligation; but it is a different and a difficult question what the precise obligation was.

We think, in the first place, that it is not, in this case, material that the building was not finished at the time when the bargain was made. No doubt it may be, under some circumstances, imprudent to lodge a carriage in an unfinished building, as it may thereby be exposed to risk from the fact that work is going on round it; and if in the present case the damage had arisen from the workmen, in the course of their work, letting fall bricks and mortar on the carriages, or from any similar cause, it would have been a question whether the defendant had not neglected his duty in placing the carriages where they were exposed to that risk. But no such question arises here. What the plaintiff offered to prove was, that due care had not been used by the builder (who was employed, not as a servant of the defendant, but as an independent contractor), to make the building reasonably safe.

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Neither does it, in our opinion, make any difference that the building in which the defendant lodged the carriages had been erected for him on his own ground. It seems to us that the extent of the defendant's obligation to the plaintiff is that of an ordinary livery stable keeper, who undertakes for reward to receive a carriage and lodge it in a coach-house which he provides. The customer in the great majority of cases does not know nor care how the livery stable keeper obtains the coach-house, though he must know that he is generally tenant for years; and the obligation of the livery stable keeper implied by law must, as it seems to us, be the same in each case.

This kind of bailment is included in what, in the celebrated case of *Coggs* v. *Bernard* (1), Lord Holt classes as the fifth sort, viz. "a delivery to carry or otherwise manage for a reward to be paid to the bailee;" as to which, says Lord Holt, "Those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events."

The language of Lord Holt is general, and applies this to all that exercise "a public employment;" and in the Prætor's Edict, "Nautæ Caupones et Stabularii," which is generally considered the origin of this head of the law, stablemen are expressly named. (2) But we take it to be established law that, by the custom of England, this extreme liability, making the bailee an insurer, is confined to carriers and innkeepers, and that livery stable keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says, "The second sort are bailiffs, factors, and such like." As to this sort, he says the bailee is only bound to take reasonable care; and "*the true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it.* But it is allowed, in the other cases" (i.e. the carrier and innkeeper) "by reason of the necessity of the thing."

The obligation to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper

(1) 2 Ld. Raym. at p. 917-918. (2) See Dig. lib. iv.; tit. ix. l. i.

state, so that the thing therein deposited may be reasonably safe in it.

If the obligation of a livery stable keeper goes no further than this, the defendant in the present case has fulfilled it, and the nonsuit was right. But the argument of the plaintiff's counsel was that the two cases of *Readhead* v. *Midland Ry. Co.* (1) and *Francis* v. *Cockrell* (2), both decided in the Exchequer Chamber, establish that a carrier of passengers, who for reward furnishes a carriage, and a person who lets sittings in a temporary stand built for the reception of spectators at a race, are under an obligation as to the sufficiency of the carriage and the stand which they supply much more extensive than this.

The point decided in *Readhead* v. *Midland Ry. Co.* (1) was that the obligation did not extend so far as to make the carrier responsible for a latent defect, which neither he nor those who made the carriage could by proper care have prevented or detected. In *Francis* v. *Cockrell* (2), which was the case of a temporary stand erected by independent contractors for the defendant and then let out by him in separate sittings to, amongst others, the plaintiff, the case is treated as strictly analogous to the case of the carrier of passengers, who, having got a carriage, in the way he finds most convenient for himself, uses it for the carriage of the passenger. And in the judgment in this Court, carefully prepared and delivered in writing by my Brother Hannen, the question is thus stated: "It becomes, necessary, therefore, for us to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care had been used, not only by the defendant and his servants, but by the persons whom he employed as independent contractors to erect the stand. It is said in the judgment in *Readhead* v. *Midland Ry. Co.* (3), 'Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given.' Applying this rule to the present case, we think that the contract of the defendant

(1) Law Rep. 4 Q. B. 379. (2) Law Rep. 5 Q. B. 184, 501.
(3) Law Rep. 4 Q. B. at p. 392.

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with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work, as well as by himself." (1)

This decision was affirmed in the Exchequer Chamber. (2) The judgments there were not written, and in some of them, as reported, expressions are used much more favourable to the extension of the doctrine of an implied warranty than the language used in the written judgment of the same Court in *Readhead* v. *Midland Ry. Co.* (3); but the two decisions are not in conflict, and both are binding on us.

We think that, where the matter is not already decided by authority, the principle by which the Court is to be guided in determining what is the obligation implied by law is that given by Lord Holt in *Coggs* v. *Bernard* (4), "that it would be unreasonable to charge the bailee with a trust further than the nature of the thing puts it in his power to perform it." Which is, we think, the same principle as is expressed in the passage from the judgment in *Readhead* v. *Midland Ry. Co.* (5) above cited by Hannen, J., in *Francis* v. *Cockrell.* (6)

And we may observe that in Pothier, Du Contrat de Louage, partie 2nd^e^, chap. 1, No. 118, 119, 120, we find a similar principle laid down, though not in the same language, as being that of the old French law. That very learned author lays it down, that where the person who lets a thing on hire knows of a defect in the thing which he lets making it unfit for the purpose for which it is let, he is responsible in damages for it. And, though he does not actually know it, that if the circumstances are such that he ought to have had a suspicion of it and made inquiry, and does not either inquire or inform the hirer, so that he may inquire for himself, he is liable:—which is so far equivalent to saying that he is bound to reasonable care and good faith. And further, that, if the letter follows a trade which makes it his duty to know whether the thing has faults or not, he is liable without proof that he did know. He puts as an example the case of a cooper, who supplies wine casks

(1) Law Rep. 5 Q. B. at p. 193.
(2) Law Rep. 5 Q. B. 501.
(3) Law Rep. 4 Q. B. 379.
(4) 2 Ld. Raym. at p. 918.
(5) Law Rep. 4 Q. B. at p. 392.
(6) Law Rep. 5 Q. B. at p. 193.

made of bad wood, so that they leak: Pothier says, "The cooper shall not be permitted to set up as a defence that he did not know the bad quality of the wood, for his profession bound him to know the quality of the wood he used, and to supply none but of good quality." This seems to us to say, in other words, that from the nature of the employment a warranty of the quality of the wood should be implied. But says Pothier, "Except in those cases, the letter, if he neither knows nor is bound to know the fault in the thing let, is not responsible in damages."

The difficulty, in a case not already settled by decisions, is to apply these principles, and to say whether the nature of the relation between the parties is such that a warranty to any, and if to any, to what extent, should be implied.

On this part of the case the observations of Crompton, J., in *Brass* v. *Maitland* (1) are weighty.

The plaintiff's counsel on the argument in this case relied mainly on the decision in *Francis* v. *Cockrell* (2), and very properly, for we feel that, unless there is a real difference between the relation of a person who takes a seat in a temporary stand to the person who furnishes the ticket admitting him to that stand, and the relation of the person who sends his carriage to stand in a coach-house to the livery stable-keeper who supplies the coach-house, the contract to be implied in the two cases should be the same. And we feel also that it is not desirable to make nice distinctions.

It is very difficult to draw the precise line between cases in which the warranty or obligation—it matters not which it is called—should be implied, and those in which it should not. But, to borrow an illustration from my Brother Bramwell, though it may not be easy, or indeed possible, to say where the line should be drawn which divides day from night, it is quite clear that noon is on the one side of that line and midnight on the other; and it is enough for the decision of this case if we can see that the present case is not one in which this warranty or obligation should be implied by law. And there seem to us to be sufficient reasons for saying that it should not in this case be implied, though it was

(1) 6 E. & B. at pp. 490–493; 26 L. J. (Q.B.) at pp. 56–58.

(2) Law Rep. 5 Q. B. 184, 501.

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implied in the case of the carrier of passengers supplying a carriage, and in the case, considered analogous, of the person furnishing a seat in a temporary stand.

In the first place, it is to be observed that in most cases where a bailee takes care of goods he must lodge them, if dead goods, in a building so as to shelter them from the weather, if live animals, either in a stable or a fenced field; and it must have often happened that the goods were injured or lost in consequence of some defect in the building or fences. In *Broadwater* v. *Blot* (1) the action was against an agister for losing a horse. On an application for a nonsuit Gibbs, C.J., said: "All the defendant is obliged to observe is reasonable care. He does not insure; and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstances which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable. *The question is, were the defendant's fences in an improper state at the time the horse was taken into agist?* Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff, who had intrusted the horse to him, had a right to expect? I shall leave it to the jury."

The passage above in italics was cited on the argument, as shewing that, in the opinion of that very learned and accurate judge, the agister would be liable if the fences were in an improper state, however caused. But it seems to us that, when taken with the context, the fair conclusion is, that the alleged improper state of the fences was such that the agister, if he took proper care, could not have been ignorant of it, and that it was only mentioned by Gibbs, C.J., as an instance of the absence of due care and diligence.

With this exception no case was cited in which it was ever suggested that there was any warranty, however limited, as to the state of the place in which goods are deposited beyond what was ex-

(1) Holt, N. P. 547.

pressed in the ruling of my Brother Pollock at the trial of the case at bar. (1)

And as far as our own research goes, there is no such case; nor can we find any suggestion to that effect in any of our text writers. In the case of the carriage supplied by a carrier, either by land or by water, it had been long a debated question whether there was not an absolute warranty: as may be seen from the authorities collected in *Readhead* v. *Midland Ry. Co.* (2)

We are, therefore, as far as authority goes, at liberty to apply the principles before stated to this case, and see if any warranty or obligation should be implied.

There is, we think, a real difference between the case of one who supplies a carriage, or a seat in a temporary stand, which is in the nature of a chattel, and one who supplies room for goods in a permanent building. We think that we must take notice of the fact, that in the general and more ordinary state of things, a warehouseman or livery stable keeper is tenant of the buildings in which he lodges the goods intrusted to him; and we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building shall be fit for the purpose for which it is let: see *Hart* v. *Windsor*. (3)

We think, therefore, that in such cases an implied warranty as to the state of the building would, to borrow Lord Holt's language already cited, be unreasonable as charging him with a trust beyond what the nature of the thing puts it in his power to perform. (4) It is reasonable to require him to use due care to ascertain whether the building is fit, and by himself and servants to take due care to maintain it in a proper state, but it would be unreasonable to go further.

It is true that, in some cases, the bailee is owner in fee of the building; and in some, as in the present case, he has it built for him; and even where lessee he might take special covenants. But these are exceptional cases; and in ea quæ frequentius accidunt præveniunt jura. We must imply the warranty or obligation which would be reasonable in the ordinary state of things, and no

(1) Ante, pp. 124, 125.
(2) Law Rep. 2 Q. B. 412; 4 Q. B. 379.
(3) 12 M. & W. 68.
(4) 2 Ld. Raym. at p. 918.

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more, even though in exceptional cases it might be reasonable to imply more, and though the particular case may be one of those exceptions.

We think, therefore, that the ruling of the learned judge was right, and that the rule should be discharged.

Rule discharged.

Attorney for plaintiff: *John Scott, for Graham & Graham, Sunderland.*

Attorneys for defendant: *Bell, Brodrick, & Gray, for W. W. Robson, Sunderland.*

Jan. 19.

THE QUEEN *v.* OASTLER.

Practice—Certiorari—Indictment removed into Queen's Bench by Defendant—Costs to Prosecutor—5 & 6 *Wm. & M. c.* 11, *s.* 3—5 & 6 *Wm.* 4, *c.* 33. *s.* 2—16 *Vict. c.* 30, *s.* 5.

By 5 & 6 Wm. & M. c. 11, s. 2 (enlarged by 5 & 6 Wm. 4, c. 33, s. 2), no indictment is to be removed at the instance of a defendant into the Court of Queen's Bench, unless the defendant enter into recognizances with two sureties to cause, at his own costs, the issue to be tried at the next assizes; and, by s. 3, if the defendant be convicted, the Court "shall give reasonable costs to the prosecutor, if he be the party grieved or injured," &c., and the recognizance shall not be discharged till the taxed costs shall be paid. By 16 Vict. c. 30, s. 5, "whenever any writ of certiorari to remove an indictment shall be awarded at the instance of a defendant, the recognizance now by law required to be entered into before the allowance of the suit shall contain the further provision, that the defendant, if convicted, "shall pay to the prosecutor his costs subsequent to the removal of such indictment":—

Held, that the statute of Victoria extended the older statute, and gave costs to a prosecutor, whether he were a party grieved or not.

A TRUE BILL having been found at the Surrey Spring Assizes, 1873, for obstructing a highway, the indictment was removed by certiorari into this court at the instance of the defendant. At the trial at the Surrey Summer Assizes, 1873, a verdict of guilty was returned; and judgment was afterwards passed on the defendant; and a side bar rule to tax the costs was obtained, as a matter of course, by the prosecutor.

Edward Clarke moved to set aside the rule for taxation, on

affidavit shewing that the prosecutor was not "a party grieved" within the meaning of 5 & 6 Wm. & M. c. 11, s. 2. (1)

(1) 5 & 6 Wm. & M. c. 11, s. 2:—"That in term time no writ of certiorari whatsoever at the prosecution of any party indicted be hereinafter granted, awarded or directed, out of the said Court of King's Bench, to remove any such indictment or presentment of trespass or misdemeanor, before trial had, from before the said justices in the said courts of general or quarter sessions of the peace, unless such certiorari shall be granted or awarded upon motion of counsel, and by rule of Court made for the granting thereof, before the judge or judges of the said Court of King's Bench sitting in open court, and that all the parties indicted prosecuting such certiorari, before the allowance thereof, shall find two sufficient manucaptors, who shall enter into a recognizance before one or more justices of the peace of the county or place, in the sum of 20*l.*, with condition at the return of such writ to appear and plead to the said indictment, or presentment, in the said Court of King's Bench, and at his and their own costs and charges to cause and procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereunto, to be tried at the next assizes to be held for the county wherein the said indictment or presentment was found, after such certiorari shall be returnable, ..."

Sect. 3. "If the defendant, prosecuting such writ of certiorari, be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden, or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done, that concerned him or them, as officer or officers, to prosecute or present; which costs shall be taxed according to the course of the said court; and that the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant and refusal of payment, on oath have an attachment granted against the defendant by the said Court for such his contempt; and that the said recognizance shall not be discharged till the costs so taxed shall be paid."

By 5 & 6 Wm. 4, c. 33, s. 2, this is extended to the removal of all indictments from any court; and the recognizance is to be in such sum and with such sureties as the Court of Queen's Bench or a judge shall order, with the same conditions as those contained in the Act of 5 & 6 Wm. & M. c. 11.

By 16 Vict. c. 30, s. 5: "Whereas it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench: Be it therefore enacted, that whenever any writ of certiorari to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognizance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment; . . ."

Sect. 6 is similar to the latter part of s. 3 of 5 & 6 Wm. & M. c. 11, as to the taxation and enforcing of the taxed costs.

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[BLACKBURN, J. There is a modern statute which now regulates the costs.]

The statute is 16 Vict. c. 30, s. 5.

[BLACKBURN, J. There is no mention of "the party grieved" there.]

The statute was only intended to give a direct remedy to the prosecutor, as is shewn by s. 6, and was not intended to extend the persons to whom costs should be payable by the defendant.

[BLACKBURN, J. The words of the enacting part of the section are perfectly general. "Any writ . . . to pay to the prosecutor his costs;" and the preamble shews that it was intentionally made general, in order to make further provision for preventing the vexatious removal of indictments into this court.]

The section refers to the recognizance "now by law required," and this enactment as to the insertion of a clause as to costs cannot be interpreted to have the effect of giving costs to another class of prosecutors than those before entitled to them.

[QUAIN, J. What other object could the enactment have?]

The object was to cause the express mention of the prosecutor's costs which was not in the recognizances under the earlier statute.

PER CURIAM (Blackburn, Quain, and Archibald, JJ.)

Rule refused.

Attorneys for defendant: *Ford & Lloyd.*

Jan. 21.

THE QUEEN, ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF THE BEDFORD UNION AND THE OVERSEERS OF KEMPSTON, RESPONDENTS, *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY, APPELLANTS.

Poor-rate—Rateable Value—Branch Railway leased in Perpetuity, other Companies willing to take it on same Terms.

The appellants, a railway company, had become possessed of a branch line communicating with their main line, on the terms that the shareholders of the company by whom the line was made should become stockholders in the appellants' company to an amount calculated as the expense of making the line. This branch line communicated with the lines of three other companies; and the appellants worked the branch at very low fares in order to divert the traffic from

the other lines on to their own line; the consequence was that the sum actually earned on the branch line was very small. If the branch line were in the market, either of the three other companies would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants held it; and would then work it in a similar manner to that in which it was worked by the appellants:—

Held, in assessing to the poor rate a part of the branch line passing through respondents' parish, that the fact that three other companies would be willing to pay what was equivalent to a large rent for it was to be taken into account as an element in ascertaining the rent at which it might reasonably be expected to let from year to year.

ON an appeal against an assessment for the poor-rate of the parish of Kempston, made on the 5th of January, 1871, the Bedfordshire Quarter Sessions dismissed the appeal, subject to the opinion of the Court of Queen's Bench on a case.

1. The appellants are owners of the line of railway from Bletchley to Bedford and of the line of railway from Bedford to Cambridge, which two lines form one continuous railway from Bletchley to Cambridge, and are worked as part of the London and North Western Railway system. Each of these lines passes through parishes in the respondents' union.

2. The line from Bedford to Bletchley is a double line and joins the appellants' main line at Bletchley.

3. The line from Bedford to Cambridge is a single line and joins the main line of the Great Northern Railway at Sandy, and then runs on to Cambridge, where it joins the Hitchin branch of the Great Northern and the main line of the Great Eastern Railway. At Bedford, the Bedford and Bletchley line crosses the main line of the Midland Railway upon the level, and, for the purposes of goods traffic, is connected with it; but the stations are some distance apart.

4. The lines from Bletchley to Bedford and from Bedford to Cambridge were originally made by independent companies, but both these lines have now become vested in the London and North Western Railway Company; the former by virtue of 8 & 9 Vict. c. xliii., the shareholders becoming stockholders of the said company, and having 4 per cent. guaranteed to them upon a sum of 365,000*l.*, agreed upon as representing the sum expended upon the line; and the latter by virtue of 27 & 28 Vict. c. lxii., whereby the line became the property of the London and North

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Western Railway, subject to a like guarantee of 4 per cent. per annum upon a sum of 290,000*l*. Either of these interests thus guaranteed would, if regarded as rent, and taken as the basis of rateable value, give a much larger rateable value per mile than that contended for by the appellants.

5. In order to compete on equal terms, as far as fares are concerned, with the Midland, the Great Northern, and the Great Eastern Railways, the appellants charge the same fares for goods and passengers carried to London or the North from any station on the Cambridge and Bletchley line viâ Bletchley and the appellants' main line, as the Midland, the Great Northern, and the Great Eastern Companies, respectively, charge for carrying the same from the same station viâ Bedford, Sandy, or Cambridge, respectively, upon their main lines.

6. The distance from Cambridge to Sandy is 21 miles; from Sandy to Bedford, 8¾ miles; from Bedford to Bletchley, 16 miles; from Cambridge to London by Great Northern Railway, 58¾ miles; from Cambridge to London by Great Eastern Railway, 57½ miles; from Sandy to London by Great Northern Railway, 44 miles; from Bedford to London by Midland, 49 miles; and from Bletchley to London by London and North Western Railway, 46½ miles.

7. The fares for a first class passenger from Cambridge to London by Great Eastern Railway is 11*s.*; by Great Northern Railway, 11*s.*; from Sandy to London by Great Northern Railway, 8*s.*; from Bedford to London by Midland, 8*s.* 6*d.*; from Cambridge to London viâ Bletchley, 11*s.*; from Sandy to London viâ Bletchley, 8*s.*; from Bedford to London viâ Bletchley, 8*s.* 6*d.*; from Bletchley to London, 8*s.* 6*d.*; and for passengers who do not continue their journey upon the appellants' main line from Cambridge to Bletchley, 7*s.* 6*d.*; from Sandy to Bletchley, 4*s.*; from Bedford to Bletchley, 2*s.* 6*d.* And in similar proportions for second and third class passengers and goods, &c.

8. The appellants ascertain what they contend to be the rateable value of the line in the respondents' parishes in the usual manner, treating the Cambridge and Bletchley line as a portion of the London and North Western system, that is to say, where a passenger is carried from Bedford viâ Bletchley to London, a

distance of 62½ miles; they apportion the fare as above described equally amongst the 62½ miles, and then deduct from the earnings of each mile so ascertained the expense of working it and other usual deductions, the same being ascertained where practicable for each particular mile, and not being a general average of the whole system; but still treating the branch from Bletchley to Cambridge as a part of the London and North Western system for the purpose of calculating the general and miscellaneous expenses.

9. The respondents contend: First, that in ascertaining the rateable value of a portion of the line in their parishes, if it is to be ascertained by deducting the working expenses from the actual receipts, they are entitled to allocate to the Bedford and Bletchley line so much of the fares charged, in such a case as that above described, as is equivalent to what is usually charged by the appellants to a traveller who travels only from Bedford to Bletchley, and that this should be apportioned equally amongst the sixteen miles from Bedford to Bletchley. (1)

10. If the Bletchley, &c., line were now in the market, either of the three companies above mentioned would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants hold it. If so acquired by either of such other companies, they would work it in a similar manner to that in which it is now worked by the appellants; and under such circumstances the traffic upon it would not produce a higher rateable value calculated upon the principle now contended for by the appellants than what it now produces. The respondents contend that the above circumstances must be taken into consideration in estimating the rateable value of the appellants' line.

If the respondents are right in either of the above contentions, the rate is to be confirmed.

If the appellants are right in their contention, their line in the parish of Kempston is to be assessed at 80*l.* per mile net rateable value.

Graham, for the respondents. It must be conceded that the conten-

(1) Kempston is situate between Bedford and Bletchley.

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tion in paragraph 9 cannot be supported in the bald way in which it is put; the contention in that paragraph is therefore out of the question, except so far as the facts connected with it bear on the question raised in paragraph 10. The respondents contend that the situation of this cross line communicating with the main lines of four great companies increases its rateable value, and makes it worth more than if it were a feeder to one line only. And it is found in paragraph 10 that if it were in the market it would at once let for more than the line itself earns; and the fact that the appellants find it worth their while to charge these low fares in order to divert the traffic from other lines cannot affect the real rateable value, which is what a tenant would give for the occupation, not what he actually makes in the parish by his occupation.

[BLACKBURN, J. Is not the case of *Newmarket Ry. Co.* v. *St. Andrew* (1) against the appellants' contention?]

It is at once distinguishable. There it was held by the majority of the Court that the sum guaranteed by another particular company ought not to be taken into account in rating the railway. But here there are several rival companies, all of whom would bid for this line if in the market, and give more for it than it earns. *Reg.* v. *Llantrissant* (2) will also be cited by the other side, but it is to be distinguished in the same way. That was the case of a branch line which could bring traffic to the Great Western Railway and to no other. All the advantages accruing to the occupier of any tenement by reason of his occupation are to be taken into account in ascertaining the rateable value of the occupation: *Rex.* v. *Liverpool Exchange.* (3) The fact that the appellants charge low fares, and so do not earn as much on the particular line as they might otherwise do, cannot reduce the rateable value.

[BLACKBURN, J. No doubt if a man chooses to leave a farm unproductive he must still pay the value as if productive. But is the fact that a fancy price can be obtained in the market to be taken into account? Suppose land lying between two extensive preserves belonging to different owners, each anxious to possess it, is the fact that they would bid against each other if it were in the

(1) 3 E. & B. 94; 23 L. J. (M.C.) 76. (2) Law Rep. 4 Q. B. 354.
(3) 1 A. & E. 465.

market to be taken to enhance its rateable value? Would that be the rent that a tenant from year to year would give for it? It is not an unlikely case to have happened; is there no such case reported?]

There is no such case to be found. All the respondents contend for is, that the fact of these four companies being competitors is an element to be taken into consideration. The amount has been agreed.

[QUAIN, J. referred to *South Eastern Ry. Co.* v. *Dorking.* (1)]

That case is directly in favour of the respondents, and the case of *London and North Western Ry. Co.* v. *Cannock* (2) is to the same effect. That case no doubt was questioned, as inconsistent with the later case of *Great Eastern Ry. Co.* v. *Haughley* (3), in *Reg.* v. *Llantrissant* (4), but there is nothing in either of those cases contrary to the present contention of the respondents. In *Reg.* v. *Fletton* (5) it was held that the defendants, who were the sole occupiers of a station, but allowed the joint use of it to the North Western Company at a fixed rent for 999 years, were rateable in respect of the whole amount of that rent. This was afterwards affirmed in the case of *Reg.* v. *Sherard.* (6) On principle, and on the authority of the above cases, the facts mentioned in paragraph 10 ought to be taken into account as an element—and that is all the respondents contend for—in ascertaining the rateable value of this line.

Field, Q.C., and *M. B. Byles*, for the appellants. The contention of the respondents in paragraph 10 is wrong. In *Great Eastern Ry. Co.* v. *Haughley* (3) the principle is distinctly laid down that, in assessing to the poor-rate a part of a railway in a particular parish, the rateable value is to be ascertained by taking the gross earnings in the parish, and making the usual deductions for working expenses, &c. applicable to that part of the railway: see also *Reg.* v. *Great Western Ry. Co.* (7)

[BLACKBURN, J. That is not the principle, but the practical mode in which the principle is carried out.

QUAIN, J. That cannot be the mode, when, as here, the company

(1) 3 E. & B. 491; 23 L. J. (M.C.) 84.
(2) 9 L. T. (N.S.) 325.
(3) Law Rep. 1 Q. B. 666.
(4) Law Rep. 4 Q. B. 354.
(5) 3 E. & E. 450; 30 L. J. (M.C.) 89.
(6) 33 L. J. (M.C.) 5.
(7) 15 Q. B. 1085; 21 L. J. (M.C.) 84.

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designedly, by charging low fares, earn less than they might in the particular parish.]

They work the railway so as to make as much as they can.

[BLACKBURN, J. So as to make the most they can; but not the most of the particular hereditament to be rated.]

Possibly the appellants ought to be rated at some higher figure than they are; but the only questions before the Court are contained in paragraphs 9 and 10. Paragraph 9 is given up; and to hold that the contention in paragraph 10 is right would be to rate the railway in parish A. for profits earned in parish B., contrary to the decision in *Reg.* v. *Llantrissant.* (1)

[QUAIN, J. Is not the principle contended for in paragraph 10 the principle laid down in *South Eastern Ry. Co.* v. *Dorking* (2), and in *Reg.* v. *Fletton* (3)?]

In those cases the railway company rated was receiving the rent.

[BLACKBURN, J. In *Reg.* v. *Fletton* (3) that was so, but not in the other case.]

The later cases of *Great Eastern Ry. Co.* v. *Haughley* (4) and *Reg.* v. *Llantrissant* (1) are inconsistent with the other cases.

[BLACKBURN, J. I am unable to see how the *Haughley Case* bears on paragraph 10.]

In this way. The reason why the three other companies would be willing to acquire this line on the same terms as the appellants is in consequence of the traffic it would bring on their respective lines; and then the paragraph goes on to say, in effect, that they would work the line in the same way, and only earn as much on the line as the appellants. In the *Haughley Case* (5) Cockburn, C.J., says: "If the traffic beyond Haughley is dealt with as a matter of profit, inasmuch as it occurs beyond the parish of Haughley it is an accident with which that parish has no concern, but which affects the rateability of the property where the profit accrues, and not elsewhere."

[BLACKBURN, J. It rarely happens that a profit is received on

(1) Law Rep. 4 Q. B. 354.
(2) 3 E. & B. 491; 23 L. J. (M.C.) 84.
(3) 3 E. & E. 450; 30 L. J. (M.C.) 89.
(4) Law Rep. 1 Q. B. 666.
(5) Law Rep. 1 Q. B. at p. 678.

an isolated piece of line between two stations. Without the rest of the line I doubt whether any railway in any particular parish would be profitable, but it becomes profitable by reason of the facilities which it affords of running trains on the other parts of the line on which profits are earned.

QUAIN, J. There are two cases cited in a note at the end of the *Dorking Case* (1) which seem, as well as the case itself, against the appellants.]

All the cases are reviewed in the *Llantrissant Case* (2); and it was there decided that the parish was not entitled to take into consideration in their assessment the value of the line to the appellants, the Great Western Railway Company, as bringing traffic to their main line, in addition to the net profit derived from the traffic passing through the parish.

[BLACKBURN, J. That is, if the above circumstance enhanced the value of the branch line, it was to be taken into account. The Court decided, rightly or wrongly, in the negative—that it did not enhance the value. But the doctrine is as old as the case of the Amwell Spring (3), that the rateable value of an occupation may be enhanced by profit made elsewhere. The effect of paragraph 10 is that four companies, for what motive is immaterial, would, if the line were in the market to be let from year to year, bid against each other; and the question is, is that to be taken into account as enhancing the value in ascertaining the rent at which it might reasonably be expected to let for from year to year?]

That is a mere fancy price which a few persons would give; not the rent which could be obtained generally in the market, which is what is meant by what it might reasonably be expected to let for from year to year.

[BLACKBURN, J. There is no case in which that distinction has been put,—that where a given rent is not only obtainable, but actually obtained, it makes any difference that it is a fancy price.

ARCHIBALD, J. In the case of agricultural land it would not do, perhaps, to take what some one person would give, but what

(1) 23 L. J. (M.C.) at p. 96 (n).
(2) Law Rep. 4 Q. B. 354.
(3) *Rex* v. *New River Co.* 1 M. & S. 503.

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persons generally in the market would give. But in the case of peculiar property like this, it is only a few persons peculiarly situate who would be bidders. Is not that the difference?]

That is not what is meant by the Parochial Assessment Act. Moreover, the fact that a fixed rent is given in perpetuity is no criterion of what a tenant from year to year would give.

[BLACKBURN, J. No doubt it may, under some circumstances, be no criterion, as in the case of *Marquis of Bute* v. *Thompson* (1), where it was held that the defendant must pay the large rent agreed on, notwithstanding the colliery was worked out; but no one would say that the rent was any criterion of the rateable value of the occupation.]

Here three companies are shewn to be ready to take the line on the same terms as the appellants; but the reason is, that the money actually earned in the parish produces a profit elsewhere. The interest guaranteed by the appellants, and which the other companies would give, is in respect of profit made out of the parish of Kempston.

[BLACKBURN, J. That may be so; but the question seems to be, if it happens that certain persons (a limited number of persons, but more than one) are desirous to have the line, because, on becoming occupiers of it, they can get a profit elsewhere, and are willing to give a high rent for it, are we not, in estimating the rateable value, to take that into account? It may, in a certain sense, be an advantage personal to a few. But in *Allison* v. *Monkwearmouth* (2), the question being whether the rateable value of a brewery, to which certain houses were attached and the tenants bound by their leases to get their beer at the brewery, was enhanced by this advantage; and it was held by Lord Campbell, C.J., and Crompton, J., that the occupier of the brewery was properly rated on the enhanced value, it being an advantage connected with the occupation, which would be taken into calculation by a tenant in estimating the annual rent; and that it was not material that the origin of this advantage was in a personal contract. Erle, J., dissentiente, and holding that this advantage was not an incident to the occupation properly to be taken into account in estimating the rent, but a personal contract transitory with the persons of

(1) 13 M. & W. 487. (2) 4 E. & B. 13; 23 L. J. (M.C.) 177.

the contractors, and only accidentally connected with the hereditaments occupied.]

That case came before the Court of Common Pleas in *Sunderland* v. *Sunderland* (1), and there the majority of the Court (Erle, C.J., and Montague Smith, J., against Byles, J.), on precisely similar facts, decided the other way.

[BLACKBURN, J. The precise point decided in the Queen's Bench was only collateral to the decision of the case in the Common Pleas.

QUAIN, J. Erle, C.J., distinguishes the cases as being on different statutes.]

The cases, if in point at all, neutralise one another. Moreover, it is to be observed that paragraph 10 says nothing about a tenancy from year to year. The three companies would be willing to acquire it on the same terms in every respect as those upon which the appellants held it; that is, they would be willing to pay a rent calculated at the interest on the given sum for a lease in perpetuity.

[BLACKBURN, J. If that was what is meant, the statement would be irrelevant; we must construe it as having a meaning which is relevant to the matter in hand.]

Lastly, it must not be forgotten that if this enhanced value is rateable in this parish, the appellants will be rated for the same thing again in the other parishes.

BLACKBURN, J. There are two questions submitted to us. The first is in paragraph 9, but the respondents' counsel admits that he cannot support that contention as it is put. Paragraph 10 is therefore all that we have to consider. [The learned judge read the paragraph.] And if we think the above circumstances ought to be taken into consideration, the rate is to be confirmed.

We must look at the general principle of rating embodied in the Parochial Assessment Act, and repeated in the Union Assessment Act, which is this:—The rateable value of the occupation of property shall be estimated at the rent which the property might reasonably be expected to produce if it were let from year to year, making certain deductions and certain allowances. It happens, unfortunately, in many of the cases that have arisen, especially in the

(1) 18 C. B. (N.S.) 531; 34 L. J. (M.C.) 121.

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case of railway and similar companies, that there is great difficulty in applying that principle; because, from the nature of the thing, the property in a particular parish could not be let by itself alone, and there is not the possibility of getting a tenant from year to year who would give an annual rent for it. Cases often happen of a link in a railway which lies in a parish between two stations; there is one station in parish A., the next station in parish B., and between the two a bit of the line in parish C., and no one could say, and it is not in the nature of things possible, that the link in parish C. could be let by itself. No one would take it. Nevertheless, in assessing it to the poor rate, you have to consider the complex matter, and ascertain as well as you can what it would let for; and to do this you have to ascertain what are the proper elements to take into consideration. Now there is one principle which is quite clear: in letting a thing from year to year, the rent would be regulated by two matters, on the one hand by the benefit the tenant would be likely to derive from the occupation: because he would not give more than that; on the other hand, by the nature of the property, such as its local situation, or how many persons there are who could supply him with an equally eligible thing, and be willing to let it to him: for while he would not be willing to give more than he expected to make by it, he would not even give that if he could get a similar thing at a lower rent. In the case in which we gave judgment the other day (1), we instanced the case of chambers in one of the Inns of Court. They are let at a higher rent than they would fetch elsewhere because they give facilities to gentlemen to carry on the profession of barristers. And if the Attorney General could only get one set of chambers to carry on his business, he would give probably an enormous rent for them; but it so happens that there are a great many sets of chambers, and the rent the Attorney General gives is just the same as that given for a similar set by a gentleman only called yesterday. So then, the rent is given because the chambers afford facilities for carrying on the business; but the rent is not given according to the profits made, and the man who makes nothing gives just as much as the man who is making thousands a year.

(1) *Mersey Docks* v. *Liverpool*, ante, p. 97.

Let us now take into consideration the matters which are to be considered as putting a maximum limit to the value of the occupation. Ever since the case of *Rex* v. *New River Co.* (1), the case of the Amwell Spring, it has been held that the value of the occupation is to be considered as enhanced by the matters to which it would give facility. How much would the occupier get from the occupation enhanced by everything which his occupation would give him? In *Allison* v. *Monkwearmouth* (2) there was no difference among the judges as to the principle, but there was a difficulty in the application. The brewery was occupied by persons who had agreements with the tenants of many public-houses—what are called "tied houses"—that they should get their beer from the brewery, and there was no doubt that more was made by the brewery in consequence; and the judges were agreed—I do not cite the exact words—that the question was, what was the value of the occupation, what facilities and matters would pass by the demise of the premises from year to year? Because, if that occupation was of a certain value, that would regulate the rent that would be given from year to year, whether the enhanced value came from a thing out of or within the parish. In the present case we have the railway, and there seems to be no other similar railway as yet existing; and the number of tenants that would be found for it would be limited to those companies which are working the railways with which this particular line would communicate; and the company who occupy it would, as incident to that occupation, and consequent on their leasing it, have the power of influencing the traffic of their own railway, be the company the Great Northern, the London and North Western, the Midland, or the Great Eastern; and it is stated that, owing to this advantage attached to the occupation, each one of these companies would, as it is expressed, be willing to "acquire it on the same terms as the appellants." Now those terms are in perpetuity. If I took the view suggested by the appellants' counsel, that that statement means what they would give only to buy the railway in perpetuity, and not that which they would be willing to pay for it from year to year, supposing, contrary to fact and contrary to what is likely to happen, the appellants offered to let it from year to year, I should

(1) 1 M. & S. 503. (2) 4 E. & B. 13; 23 L. J. (M.C.) 177.

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say the parties had not given the Court the right test; because a company might well give for the railway in perpetuity a much larger sum in proportion than they would give for it from year to year. I do not think the statement can mean that; it must mean to state something that would be taken into account if the railway were lettable from year to year for occupation each year. If that be the meaning, I cannot help thinking that the rent to be obtained for letting it would be enhanced by the fact that there were four competitors who would be willing to take it. I do not think that the whole of what would be given as rent from year to year is necessarily to be taken, still less what it would let for in perpetuity; but I think the fact that there are those competitors who would be willing to bid for it is an element to be taken into consideration in estimating the annual value. In the present case, it is sufficient to say that this fact is an element to be taken into consideration. Supposing the railway were to be put up to be let from year to year, what rent would be actually given? that is what the sessions would have to get at. It would be a difficult question to decide; but I do not think we can disregard the fact that there are four competitors who would bid against each other. That being our opinion, according to the statement in the case, the rate is to be simply affirmed, and our judgment must be for the respondents. That is, technically, the rule must be discharged.

QUAIN, J. I am of the same opinion. All that we have to decide is whether the matter contained in paragraph 10 ought to be taken into consideration in the determination of the rateable value of the railway in this particular parish. I am of opinion that it ought to be taken into account. We do not decide that the rent, as given, or which these parties would be willing to take it at, is conclusive; but simply that it is an element to be taken into consideration. We are told that several railway companies would compete for it, because it is so valuable as influencing the traffic on their respective lines; and they would be therefore willing to acquire it on the same terms and pay the same rent for it as the appellants do now. Thus I understand the value of the occupation would be, not merely what the railway earns in the particular parish, but something more, some enhanced value by reason of its

facility of communication with other railways. The test is, what would the line be reasonably expected to let for from year to year? And, as I understand it, the *Dorking Case* (1) distinctly decides that, in ascertaining that, you may take into consideration, not only the actual earnings in the parish, but also what further profit the tenant would make by reason of the occupation, although that profit may be earned elsewhere. For these reasons I agree that the matter contained in paragraph 10 ought to be taken into consideration.

ARCHIBALD, J. I am of the same opinion. Paragraph 9 is entirely out of the question, and paragraph 10 alone remains for our consideration. All we can do in these cases is to apply as nearly as we can the principles of the Parochial Assessment Act. Applying them here, I am quite clear that, in order to ascertain what the value of this part of the railway, let from year to year, is, there ought to be taken into consideration, not merely the value of that part of the railway alone, but as it is enhanced by other advantages that go along with it. It is found in paragraph 10 that each of the companies named would be ready to acquire it on the same terms as the appellants, and to work it in the same way, and so they would derive the same advantages as the appellants derive. In its literal meaning paragraph 10 may, perhaps, be confined to what the appellants' counsel urged it meant, namely, that there are companies who would be willing to acquire the line only on precisely the same terms as the appellants hold it; but I think we must infer from that, that if it were to be let from year to year there are parties who would be willing to bid for it, and willing to take it on similar terms; and if so, they would take it with all its advantages. That being the case, I think the circumstances mentioned in paragraph 10 ought to be taken into consideration in estimating the rateable value: and I therefore agree that our judgment ought to be for the respondents.

Rate affirmed.

Attorney for appellants: *R. F. Roberts.*

Attorneys for respondents: *Shum, Crossman, & Crossman.*

(1) *South Eastern Ry. Co.* v. *Dorking*, 3 E. & B. 491; 23 L. J. (M.C.) 84.

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THE QUEEN *v.* THE LOCAL GOVERNMENT BOARD.

The Metropolitan Poor Act, 1867 (30 *Vict. c.* 6), *s.* 67—"*Office*"—*Compensation for Loss of Office—Solicitor to Board of Guardians.*

The parish of M. was managed by trustees under a local Act. On the 1st of January, 1856, the Act for the Better Management of the Metropolis (18 & 19 Vict. c. 120) came into operation. By s. 90 all the powers of the trustees (except such duties as relate to the affairs of the church or the management or relief of the poor) ceased, and were transferred to the vestry. The trustees, continued as a body having the management and relief of the poor. In February the trustees resolved that after Lady Day, 1857, the business of the board should be conducted by one clerk, with the aid of a solicitor, and that the office of solicitor be offered to S., who accepted the offer. On the passing of the Metropolitan Poor Act, 1867 (30 Vict. c. 6), the Poor Law Board, under s. 73, directed that, after the 7th of July, 1867, the relief of the poor in the parish of M. should be managed by a board of guardians elected according to the Poor Law Acts. By s. 74 the guardians are subject to the same regulations as the guardians elected under the Poor Law Acts. By s. 76 officers and persons appointed or acting under any such local Act for any purpose of the relief of the poor, or otherwise in the service of the guardians . . . shall be entitled to continue in office after the constitution of the new board of guardians under this Act to the same extent as if this Act had not been passed, and their service before the constitution of that board shall be reckoned in the computation of any superannuation allowance to which they may become entitled: Provided that in case any officer of a union or a parish shall be deprived of his office by reason of the operation of this Act, the Poor Law Board may award to him such compensation for the loss of his office and its emoluments, either by way of gross sum or by way of annuity, as to them shall seem reasonable. The board of guardians continued the appointment of S. as solicitor; but the Poor Law Board having refused to sanction it, as not being authorized by s. 74, the board of guardians gave S. notice that his appointment would be determined on the 29th of September, 1867:—

Held, that S. held an office within the meaning of the Metropolitan Poor Act; and that he had been deprived of his office by the operation of that Act, and was entitled to compensation.

Rule calling on the Local Government Board to shew cause why a mandamus should not issue, commanding them to inquire into, assess, and make an award for such compensation, either by way of gross sum or of annuity, as the board should deem it reasonable to award to William Sparling for the loss of his office as an officer of the parish of Saint Mary, Islington, and of the emoluments thereof, by reason of the operation of the Metropolitan Poor Act, 1867 (30 Vict. c. 6).

1872. Nov. 13. *Sir J. D. Coleridge, A.G.*, and *E. Lumley*, shewed cause.

Bond Coxe supported the rule.

The following cases were cited: *Rex* v. *Bridgewater* (1); *Reg.* v. *Warwick* (2); *Reg.* v. *Poor Law Board.* (3)

The facts and arguments sufficiently appear from the judgment.

Cur. adv. vult.

1874. Jan. 14. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

BLACKBURN, J. In this case a rule has been obtained for a mandamus to the defendants to assess reasonable compensation to William Sparling. Cause was shewn by the late Attorney General (the present Chief Justice of the Common Pleas), who stated that the board were contented to abide by the decision of this Court as final.

We have therefore to determine not merely whether there is enough doubt to make it proper to let a writ go, but whether we think that the applicant is entitled to have compensation; the amount of that compensation not being a question before us. It was agreed that the facts were all accurately stated in the affidavit of Mr. Sparling. The material facts are as follows:—

The parish of St. Mary, Islington, was managed by trustees under a local Act 5 Geo. 4, c. cxxv. On the 1st of January, 1856, the Act for the better Local Management of the Metropolis (18 & 19 Vict. c. 120) came into operation, and by the 90th section of that Act all the powers of the trustees (except such duties, &c., as relate to the affairs of the church or the management or relief of the poor) ceased and were transferred to the vestry.

The trustees, however, continued as a body having the management and relief of the poor.

On the 18th of February, 1857, a resolution was passed by the trustees, which was in the following terms:—"That the board having fully considered the duties of the clerk and assistant clerk, resolve that on and after Lady-day next, the business of the board may be conducted by one clerk at a salary of 250*l.* per

(1) 6 A. & E. 339. (2) 10 A. & E. 386.
(3) Law Rep. 6 Q. B. 785.

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annum, with the aid of a solicitor for the arrangement of legal matters at 100*l.* per annum; and that the office of solicitor be offered to Mr. Sparling." Mr. Sparling accepted this offer; and we apprehend that it is clear on the one hand that he did not thereby acquire any freehold office during life or good behaviour, but also clear on the other that he did become possessed of a situation, or place, or employment under the trustees; and that if he had been dismissed without sufficient cause, and without reasonable notice to terminate his employment, he would have had a remedy for such dismissal.

On the passing of the Metropolitan Poor Act, 1867 (30 Vict. c. 6), the Poor Law Board under the 73rd section, directed that from and after the 7th of July, 1867, the relief of the poor in the parish of St. Mary, Islington, should be managed by a board of guardians, elected according to the Poor Law Acts; and by the 74th section of that Act the guardians constituted under this Act are subject to the same regulations as guardians elected under the Poor Law Acts.

The 76th section provides that "officers and persons appointed or acting under any such local Act for any purpose of the relief of the poor, or otherwise, in the service of the guardians, and superintendent registrars of births, deaths, and marriages, and registrars of births and deaths, and registrars of marriages, shall be entitled to continue in office after the constitution of the new board of guardians under this Act to the same extent as if this Act had not been passed; and their service before the constitution of that board shall be reckoned in the computation of any superannuation allowance to which they may become entitled: Provided that in case any officer of a union or a parish shall be deprived of his office by reason of the operation of this Act, the Poor Law Board may award to him such compensation for the loss of his office and its emoluments, either by way of gross sum or by way of annuity, as to them shall seem reasonable." It is on the proper construction of this section that our judgment in the present case depends. Before, however, proceeding to discuss the construction of that section, it is convenient to state the remaining facts.

The board of guardians, on their first meeting, continued the appointment of the applicant as solicitor, but the Poor Law Board refused to sanction this appointment, as it was not authorized by

the regulations to which the guardians were subject by virtue of the 74th section above quoted. The board of guardians on the 30th of July, 1867, gave notice to Mr. Sparling that his appointment, not being sanctioned by the Poor Law Board, would be determined on the 29th of September then next.

Mr. Sparling made application to the Poor Law Board to award him compensation for the loss of his office as to them should seem reasonable. They declined to entertain his claim.

Subsequent to the passing of the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), the application was renewed to the now defendants, and they also refused to entertain the application.

This rule was then obtained. Two points were made for the defendants. First, it was said that the applicant was not deprived of his situation by reason of the operation of the Act. But we expressed our opinion on the argument that, as the effect of the Act was to subject his employers to the regulations which rendered it illegal in them to continue his employment, he had been deprived of it by reason of the operation of the Act.

The second objection was that this employment was not an office within the meaning of the Act. On this question we took time to consider. We agree that the word "office," in its strict legal meaning, would not include such an employment as this. We doubt very much whether there was any person employed for any purpose connected with the relief under a local Act whose employment could be called an office in the strict legal sense of the word; if there were such persons they must be very few; and to give the word this strict legal sense would be to render the Act nugatory. But we think that we must construe the words of this Act with reference to the subject-matter and the context. The Municipal Corporation Act (6 & 7 Wm. 4, c. 76), s. 66 gave compensation to those who had lost "an office of profit." In *Rex* v. *Bridgewater* (1) the person claiming compensation was clerk to the justices of the borough, and it was argued that this was not an "office"; but Williams, J., there says: "This may, in some sense, possibly be considered no office; but not in the sense used in the Act. The effect of the 66th section, especially that part of it in which the party claiming is directed to distinguish, 'the office,

(1) 6 A. & E. 339.

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place, situation, employment, or appointment,' seems to be that a reasonable interpretation is to be given, and that the word 'office' must be understood in a greater latitude than an office strictly legal." And this was, we think, the ground of the decision in that case. And we think that we ought to apply the principle to this case. Now when we find, in the enacting part of the section, that "officers and persons appointed or acting under any such local Act for any purpose of the relief of the poor," "shall be entitled to continue in office after the new constitution of the board," and that then in the proviso immediately following the words "officer" and "office," are again used; we think that the word "office" must be understood in a greater latitude than an office strictly legal, and must be construed to include the situation of those persons appointed or acting for the relief of the poor, who under the earlier part of the section would be entitled to continue in office. And we are the more induced to put this construction on the Act, because we think that to put the strict legal construction on the word "office" would render the Act nugatory, and give compensation to very few, if any, persons. This we cannot believe to have been the object of the legislature.

It was argued, that in the second section of the Act it was enacted that "words shall have the same meaning as in the Poor Law Acts," and that this Act, therefore, incorporates the interpretation clause of 4 & 5 Wm. 4, c. 76, s. 109, which enacts that "officer shall be construed to extend to any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant governor, master or mistress of a workhouse, or any other person who shall be employed in carrying this Act or the laws for the relief of the poor into execution;" and it was said that a solicitor is not there named. We do not agree that where from the context it appears that a word is used in a particular sense we are to depart from that sense because in the interpretation clause it appears that the word is to be extended to include other things; but if we did, we should say that a solicitor employed to transact the legal poor-law business of the parish is a person employed in carrying the Acts for the relief of the poor into operation. And it may not unreasonably be said that a solicitor employed at a fixed salary to do this is very much ejusdem generis with a medical man who

receives a fixed salary for attending the sick poor; and a medical man is mentioned as an officer.

But our judgment does not depend on the interpretation clause contained in the Act of 1834, though brought into the Act of 1867. We proceed on what seems to us, from the object of the 67th section of the Act of 1867 and the language there used, to be the intention expressed in that enactment.

We are, therefore, of opinion that the Local Government Board ought to inquire into the circumstances, and award such compensation as to them shall seem reasonable. We give no opinion as to what that should be.

Rule absolute.

Attorneys for prosecution: *Satchell & Chapple.*
Attorneys for defendants: *Sharpe, Parkers, Pritchard, & Co.*

THE QUEEN, ON THE PROSECUTION OF THE LONDON AND NORTH-WESTERN RAILWAY COMPANY, APPELLANTS, v. THE OVERSEERS OF THE PARISH OF SUTTON COLDFIELD, RESPONDENTS. *Jan.* 28.

Practice—Quarter Sessions, Appeal from—Case stated by Quarter Sessions—Certiorari.

On an appeal against a poor-rate the sessions granted an application to enter and respite the appeal, subject to a case for the opinion of the Court of Queen's Bench; the reservation at the end of the case being, if the Court should be of opinion that the Quarter Sessions ought not to have granted the application, the entry of the appeal is to be struck out:—

Held, that the point being raised on an order which did not finally dispose of the appeal the Court would not entertain the case.

ON an application by the appellants to the Warwickshire Epiphany Quarter Sessions, holden at Warwick, on the 31st of December, 1872, to enter and respite an appeal against a poor-rate made by the respondents, on the 18th of October, 1872, the application was granted, subject to a case for the opinion of the Court of Queen's Bench.

1. The assessment committee of the Aston Union on the 2nd of April, 1872, duly approved a valuation list for the parish of Sutton Coldfield, in which list the appellants were assessed in respect of their railway and premises in the rateable value of 1330*l.*

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2. On the 17th of May, 1872, the overseers of the parish duly made a rate in conformity with the valuation list.

3. On the 3rd of August, 1872, the appellants gave notice of objection to the assessment committee and to the overseers against the valuation list, but there was no meeting of the assessment committee between the 3rd of August and the time of holding the Epiphany Quarter Sessions.

4. On the 30th of September, 1872, the appellants paid the rate made on the 17th of May.

5. On the 18th of October, 1872, the overseers duly made another poor-rate in conformity with the valuation list, and no further notice of objection to the valuation list was given by the appellants after the making of the last-mentioned rate, but on the 6th of December, 1872, they gave notice of appeal to the Quarter Sessions against the rate.

6. At the quarter sessions the appellants made application to enter and respite the appeal. It was objected by the respondents that the appellants after the making of the rate appealed against, had not (so far as it was concerned) gone before or failed to obtain relief from the assessment committee, and it was contended that a notice of objection ought, after the making of the rate, to have been given to the assessment committee against the valuation list as a condition precedent to an appeal against the rate, and *Reg.* v. *Great Western Ry. Co.* (1) was cited. But the Sessions were of opinion that it did not apply in this instance, and that the notice of the 3rd of August was a still existing notice of objection.

7. The appellants contended that the rate having been made on a valuation list in which the figures were the same (so far as they were concerned) as when they gave notice of objection on the 3rd of August, and the notice of objection not having been heard by the assessment committee, it was unnecessary that they should again give notice of objection to the valuation list, and the Court of Quarter Sessions entered and respited the appeal.

If the Court should be of opinion that the Court of Quarter Sessions ought not to have granted the application; the entry of the appeal against the rate is to be struck out.

(1) Law Rep. 4 Q. B. 323.

Jan. 17. *A. S. Hill, Q.C.*, and *Soden*, for the appellants. *Wills, Q.C.*, and *Dugdale*, for the respondents.

The Court giving no judgment on the point argued, the arguments are omitted.

Cur adv. vult.

Jan. 28. The judgment of the Court (Blackburn and Quain, JJ.) was delivered by

BLACKBURN, J. In this case on appeal against a poor-rate, the sessions granted an application to enter and respite the appeal, subject to a case for the opinion of this Court.

The case came on for argument before my Brother Quain and myself, but we are of opinion that we ought not to take notice of the facts stated in a case reserved on such an order.

This Court has not, in general, any jurisdiction to review the decision of the Court of Quarter Sessions on any matter in which that Court had jurisdiction; nor will this Court take any notice of a case reserved by the sessions on the trial of an indictment: *Rex* v. *Salop.* (1)

But there is an exception from that general rule in cases where the Court of Quarter Sessions on appeal makes an order either confirming or reversing the decision appealed against, subject to the opinion of this Court on some point of law reserved on a case stated by the sessions. This Court will then, on a certiorari bringing up the order of sessions, take cognizance of the facts stated in the case, and quash or confirm the order of sessions, according to their view on the points of law submitted to them by the sessions.

But such cases have never been heard, except on a certiorari to bring up an order of sessions which, if unreversed, would finally decide the appeal. There have been instances in which an attempt has been made indirectly to obtain the opinion of this Court on a preliminary point by making an order in form disposing of the appeal finally, but subject to a case in which it was directed that, in the event of the Court deciding in a particular way, the case should be remitted to be reheard by the sessions.

In *Reg.* v. *Kesteven* (2), decided in 1844, Lord Denman, C.J., said: "It is satisfactory that we may now take it as universally known

(1) 13 East, 95. (2) 3 Q. B. 810.

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that, on cases sent from the sessions, the Court of Queen's Bench will not decide merely for the purpose of putting the inferior Court in motion."

Notwithstanding this, there was a renewed attempt to do this. In *Reg.* v. *Marton-cum-Grafton* (1), in 1847, the sessions, on appeal, confirmed an order subject to a case in which it was stated that, if the Court was of opinion that the sessions were wrong on one of the points reserved, the case should go back to be heard on its merits. The Court of Queen's Bench, noticing this, took time to consider as to their judgment on this point, and in the considered judgment said: "We have repeatedly declared that we shall not act on such a direction, but that the Court below ought to hear and decide the appeal, subject to the opinion of this Court on the point reserved . . . We have had occasion to advert to such matters before, and this case affords a fit opportunity for declaring that we may find it absolutely necessary for the discharge of our other duties to decline answering cases thus improperly stated."

In that case, however, the Court did express an opinion that the sessions had taken a right view on the point reserved. This is a strong authority for saying that a point, not finally disposing of the appeal ought not, in any form, to be brought before the Court on a case. But this is the first instance, as far as we can find, in which it has ever been attempted to obtain the opinion of this Court in this form. We have in form the order of the sessions to enter and respite the appeal brought before us by certiorari, and a rule has been obtained to quash it. We think we can no more look at the special case reserved on such an order than the King's Bench could look at that reserved by the sessions on the trial of an indictment in *Rex* v. *Salop.* (2)

The order being clearly good on the face of it, and we not taking notice of the facts stated in the case, the rule to quash the order must be discharged.

It is not to be understood that we give any judgment on the points sought to be reserved on this occasion.

Rule discharged.

Attorney for prosecution: *R. F. Roberts.*

Attorneys for defendants: *Beal & Co.*

(1) 10 Q. B. 971; 16 L. J. (M.C.) 159. (2) 13 East, 95.

HARDING, Appellant; HEADINGTON, Respondent.

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Jan. 21.

Highway—Turnpike—Evasion of Toll by Occupier of adjoining Land—3 Geo. 4, c. 126, s. 41.

By the General Turnpike Act (3 Geo. 4, c. 126), s. 41, if any person shall, with horse, carriage, &c., pass from any turnpike road over any land near to or adjoining thereto (not being a public highway, and such person not being the owner or occupier, &c., of such land) with intent to evade the payment of tolls, . . . or if any person shall do any other act with intent to evade tolls whereby the same shall be evaded, every such person shall forfeit a sum not exceeding 5*l.*

The respondent, being the occupier of a farm adjacent to a turnpike road, made a gap in the hedge a few feet on one side of a toll-gate at which tolls were authorized to be taken, and formed a semicircular road for a few yards over his farm, with a gap into the turnpike road a few feet on the other side of the gate. He then, with a horse and carriage, having passed more than 100 yards along the turnpike road, with the intention to avoid paying the toll, passed through one gap over the road on his own land, and back again by the other gap into the turnpike road, and then passed more than 100 yards along the turnpike road:—

Held, that the respondent came within the exception in s. 41, and was not liable to a penalty for evading the toll.

Case stated by Justices of Berkshire under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, the surveyor to the trustees of the Maidenhead Turnpike Roads, against the respondent, that he, on the 3rd of April, 1872, at the parish of Cookham, being the driver of a carriage drawn by one horse, unlawfully did go off the Maidenhead turnpike road there situate within 100 yards of the Maidenhead Thicket turnpike gate over a private road there situate, and did return again into the said turnpike road within 100 yards of the said turnpike gate, with intent then and there to evade the payment of the toll, to wit the sum of 2½*d.*, payable at the said turnpike gate, and whereby the payment of the said toll was then and there evaded, contrary to the General Turnpike Act (3 Geo. 4, c. 126, s. 41). (1)

(1) 3 Geo. 4, c. 126, s. 41. If any person shall, with any horse, cattle, beast, or carriage, go off or pass from any turnpike road through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner, or occupier, or servant, or one of the family, of the owner or occupier of such land or ground), with intent to evade the payment of the tolls granted by any Act of Parliament; or if any owner or occupier of any such land or ground shall knowingly or willingly permit or suffer

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Upon the hearing it was admitted by the respondent that the Maidenhead Turnpike Trustees, appointed under the Maidenhead Turnpike Road Act (7 Geo. 4, c. lxx.), are duly authorized to erect the Maidenhead Thicket toll-gate on the Maidenhead turnpike road, and may demand toll for the passage of vehicles along the said road, but not for the passage of vehicles not passing above 100 yards upon the said road. (1)

It was also admitted by the respondent that the provisions of the statute 3 Geo. 4, c. 126, are applicable to the Maidenhead turnpike road.

It was proved and found as a fact that upon the said turnpike road, which is the high road between Reading and Maidenhead, there has been erected for thirty years a toll-house known as the Maidenhead Thicket toll-house.

The respondent is the resident occupier of a farm in the parish of Wargrave, and about five years ago became the occupier of the Highway Farm, which adjoins the Maidenhead turnpike road on the north side of it, and extends on the east side of the Maidenhead Thicket gate for a distance of upwards of half a mile, and on the west side of the gate for a distance of about 160 yards. There are no gates from the turnpike road on to the Highway Farm on the Reading or west side of the Thicket toll-gate between the Thicket and the toll-gate, a distance of about 160 yards, nor on the Maidenhead or east side of the toll-gate for 150 yards and upwards from the Thicket toll-gate.

Until about three years ago the hedge of Highway Farm near

any person (except as aforesaid) with any horse, &c., to go or pass through or over such land or ground with intent to evade any such tolls; . . . or if any person shall do any other act whatever, in order or with intent to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall for every such offence forfeit and pay any sum not exceeding 5*l*.

(1) By 7 Geo. 4, c. lxx. s. 12, it is made lawful for the trustees or their servants "to demand, receive, and take *at* the turnpike or toll-gate and side gate now erected and to be continued, or hereafter to be erected, by virtue of this Act," the several tolls enumerated. By s. 13 it is provided "that if any person shall have paid the toll hereby authorized to be taken for the passing of any horse, &c., *through* any such turnpike, toll-gate, side gate, or bar continued or erected by virtue of this Act, the same horse, &c., shall," upon production of a ticket, "be permitted to pass and repass toll free, &c., during the same day, from 12 p.m. to 12 p.m."

the toll-gate continued in an unbroken line parallel with the turnpike road, on the north side of it.

The respondent about three years ago cut the hedge of the Highway Farm adjoining the turnpike road in two places, one on the east and one on the west side of the toll-gate, at a distance of twenty feet from the toll-gate. He at the same time made a road twenty-six feet wide over the land which formerly was used as a part of Highway Farm to connect these openings, and made a post and rail fence filled with bushes on the north side of the respondent's road. The road thus made was a semicircle, at the middle of which was a gate.

There are no gates at the openings of the respondent's road on to the Maidenhead turnpike road. The said road was metalled and gravelled when it was first made.

The only means of preventing the free passage of passengers over the road is the gate placed across the middle of the road. The public have, since the making of the road, had free use of the road, with the exception only of the right of passing through the gate placed thereupon, at pleasure. The gate, at the time it was so placed, was fitted with a lock, and the respondent at the same time gave to the collector of tolls appointed by the trustees, and who lived at the toll-gate, a key of the lock, which was received by him in order that he, the collector, or the collector for the time being, might keep the gate locked at his will, so as to prevent any persons, other than respondent, passing over and along the road.

The respondent's road is not capable of being used as an entrance to Highway Farm in any way whatever, and it was made and has been since occasionally used by him and his servants only for the purpose of enabling him to avoid passing through the toll-gate and of evading the payment of toll. Until the road was made the respondent duly paid toll when he passed through the toll-gate; but since the road has been made he has passed over the road made by him instead of passing through the toll-gate, and has wholly refused to pay toll.

On the 3rd of April, 1872, the respondent drove a chaise, drawn by one horse, along the Maidenhead turnpike road in the direction from Reading, and on his way from his farm at Wargrave, and had travelled more than one hundred yards on the turnpike

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road before he reached the turning from it to the respondent's road on the Reading side of the Thicket toll-gate. When he approached within seven yards of the toll-gate, he drove off and passed from the turnpike road on to the road made by him, and returned on to the turnpike road about seven yards on the Maidenhead side of the toll-gate, having passed over the road so made by him with the intent to evade the payment of the toll, if toll could be legally demanded of him. He then continued along the turnpike road towards Maidenhead for several hundred yards, and did not pass through any gate belonging to Highway Farm.

On the part of the appellant it was contended that the respondent ought to be convicted under s. 41 of 3 Geo. 4, c. 126. It was also contended that as the respondent had travelled one hundred yards along the turnpike road before he turned from it, he had incurred toll, and having passed from the road only to evade the payment of toll, he should be convicted; and that if the respondent could legally pass from the Maidenhead turnpike road on to the road made by respondent without paying the toll, he could not return again on to the turnpike road and travel one hundred yards upon the road without being liable to pay toll.

On the part of the respondent it was contended that, as occupier of the Highway Farm, he could legally make the road, and afterwards use it for the purpose of evading the toll-gate, and that he was not liable, under the circumstances, to pay toll.

The justices were of opinion that the respondent had not been shewn to have incurred the liability to pay toll, and was entitled to make and use the road for the purpose of evading the toll-gate; and that he, being the occupier of the land or ground of which the road so fenced off formed part, had not, by using such road, committed any offence under 3 Geo. 4, c. 126, s. 41, and the justices dismissed the information, with costs against the appellant.

The question for the opinion of the Court was, whether, upon the above facts and the law applicable thereto, the justices were correct in their determination.

H. D. Greene, for the appellant. The respondent ought to have been convicted of evading the toll, under s. 41 of 3 Geo. 4, c. 126. There are certain exemptions from liability to toll given in s. 32

(as explained by 4 & 5 Vict. c. 33, s. 1), but the appellant having passed more than 100 yards along the road, both before and after he evaded the toll-gate, is not within them: see *Veitch* v. *Exeter Turnpike Roads* (1); *Horwood* v. *Powell.* (2)

[BLACKBURN, J. There the person had passed through the gate. By ss. 12 & 13 of the Local Act it appears that the tolls are only leviable at the gate, or for passing through the gate.]

It may be admitted, for the present purpose, that the respondent must pass through the gate in order to be liable for not paying the toll, but it was necessary to shew that he was liable to pay the toll if he passed the gate, in order to make out that he had been guilty of evading it.

[QUAIN, J. Is not the respondent clearly within the exception in s. 41, "being the occupier" of the Highway Farm?]

The exception was not intended to apply to such a case as this, but to such cases as where a man lives in a park or large farm, and has a private road up to his house, by which he avoids going through a turnpike.

[BLACKBURN, J. The exception is quite general.]

The exception does not enable him to come back to the road.

[BLACKBURN, J. Why not?]

By coming back to the road he does "some other act," and comes within the last clause of the section.

[BLACKBURN, J. He does some other act, but not in order to evade the toll; that he had already done.]

Sawyer, for the respondent, was not heard.

BLACKBURN, J. The toll is only leviable at the gate, and it is unnecessary to consider whether it becomes due on passing 100 yards along the road. Having used the road to that extent, the respondent, had he come to and passed through the gate, would have been bound to pay; and if he does some act to evade the payment, he is liable to the penalty, if it be one of the acts mentioned in s. 41. There is no doubt that what the respondent did was one of the acts mentioned, for he went off the turnpike road on to ground not a public highway in order to evade the toll; but then the section expressly says this must be done by a

(1) 8 E. & B. 986; 27 L. J. (M.C.) 116. (2) 30 L. J. (M.C.) 203.

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person "not being the owner or occupier of the ground." Here the respondent was the occupier of the farm over which he had made the road, and therefore came within the exception. Mr. Greene argued that the respondent came within the latter part of the section, and that by coming back to the road he did "some other act;" but to hold this would be to strike out altogether the earlier part of the section containing the exception.

QUAIN, J. I do not see how the respondent could be convicted under s. 41, when it is said that a person passing over land, not being the occupier of the land, shall incur the penalty. Again, "some other act" means some other separate act not done by a person going over land in his own occupation.

ARCHIBALD, J., concurred.

Judgment for the respondent.

Attorney for appellant: *Raw, for Turner, Maidenhead.*

Attorney for respondent: *James Crowdy, for R. A. Ward, Maidenhead.*

Jan. 23.

MUSGRAVE *v.* THE INCLOSURE COMMISSIONERS FOR ENGLAND AND WALES.

General Inclosure Act (8 & 9 *Vict. c.* 118), *s.* 27—*Provisional Order*—"*Rights of Pasturage usually enjoyed*" *by Lord of Manor or Tenants—Evidence of such Rights—Claims and Objections to Rights of Common.*

By s. 27 of the General Inclosure Act (8 & 9 Vict. c. 118) the commissioners are to set forth in their provisional order the terms on which the inclosure should be made, and, if the lord of the manor be entitled to the soil of the land proposed to be inclosed, "shall specify the proportion of the land which should be allotted to the lord in respect of his right and interest in the soil, either exclusively or inclusively of his right to the mines, &c., under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants."

The plaintiff, the lord of a manor, was owner of the soil of the waste proposed to be inclosed, consisting of four tracts, and was also owner of seven farms of demesne lands. The provisional order directed that one sixteenth part in value of the waste should be allotted to the plaintiff as lord of the manor in lieu of his right and interest in the soil, exclusively of his right to the mines, &c., under the same:—

Held,—1. That "right of pasturage which may have been usually enjoyed by

the lord or his tenants," meant the quasi right of pasturage over the wastes of the manor enjoyed by the lord or his tenants in respect of his demesne lands in such a manner as would establish, in ordinary cases, an immemorial right of common. 2. That the provisional order, being silent as to the right of pasturage, must be taken not to have included it in the allotment of one sixteenth.

The plaintiff having sent in claims to pasturage over all four tracts in respect of his seven farms, objections were delivered to some of the claims, but no objection was sent in as to the claims over one of the tracts:—

Held, that, by the scheme of the Act, the valuer and assistant commissioner had no power to disallow the claims which were not objected to.

In order to support a claim (made on the inclosure in 1860) in respect of one of the farms called "The Mains," over one of the tracts called "The Fell," it was proved that the farm was between three and four miles from the Fell. The tenants of the farm, previous to 1826, were dead. The tenant, in 1828, turned a few horses on the Fell and also sixteen or eighteen sheep during the summer of that year, and a pony in 1844 and 1845. But the tenant did not keep a flock fit to be turned on the Fell, and sheep were not sent to the Fell, because there was better pasture on the Mains. Sheep were also sent to the Fell during the years 1859, 1860, and 1861. Leases were produced from the plaintiff's custody, beginning in 1677, in which rights of common generally were granted to the tenants of the Mains; and in leases of 1727 and 1741 it was agreed that the tenant of Mains should have a right of way for his cattle and sheep to and from the Fell over one of the other farms; and in a series of leases of that other farm from 1732 to 1791, there was a proviso that the tenants of Mains should have this right of way:—

Held, that there was sufficient evidence of a right of pasturage usually enjoyed by the lord or his tenants.

ACTION upon a feigned issue under s. 56 of the General Inclosure Act (8 & 9 Vict. c. 118), to try whether plaintiff was entitled to certain quasi rights of common which he claimed.

2. At the trial at the Cumberland Summer Assizes, 1866, a verdict was taken for the plaintiff, subject to a case to be stated by an arbitrator. The facts found by the arbitrator, so far as necessary for the present report, are as follows:—

5. The plaintiff is lord of the manor of Kirkoswald, which is co-extensive with the township of Kirkoswald, in the parish of Kirkoswald, in the county of Cumberland; and as such lord he is seised of four tracts of waste land, parcel of the manor, and lying within the township of Kirkoswald, called Haresceugh Fell, containing 2343*a.* 1*r.* 10*p.*, Viol Moor, containing 127*a.* 1*r.* 3*p.*, Tod Bank Hill, containing 7*a.* 2*r.* 25*p.*, and Berry Moor, containing 12*a.* 2*r.* 33*p.*, subject to such rights of common of pasture or rights of pasturage as can be legally established over them.

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6. The plaintiff is also seised of certain farms and lands situate in the township and manor of Kirkoswald, viz. 1. A farm consisting of lands called respectively High Mains and Low Mains; 2. A farm called Fog Close, or Fog Closes, sometimes called the Fog, and consisting of lands called respectively High Fog Closes and Low Fog Closes; 3. A farm called the Demesne Farm; 4. A farm called Housegills, sometimes High Housegill and Low Housegill; 5. A farm called Parks Farm, sometimes Park House Farm, consisting of lands formerly called respectively Old Parks Farm and Lodge Park Farm; 6. A farm called High Bank Hill; and, 7. Certain woodlands.

7. These farms and woodlands, together with the manor of Kirkoswald, have been held by the plaintiff and his ancestors for many years last past. No evidence was adduced to shew that the manor has ever been held under a title separate and distinct from the farms and woodlands. Several of the leases produced refer to the farms and woodlands as portions of the demesnes of the manor; and the arbitrator finds that all the farms and woodlands are in fact demesnes of the manor.

8. The township of Kirkoswald is divided into the High Quarter and Low Quarter. The High Quarter comprises Haresceugh Fell, Viol Moor, and Tod Bank Hill. The Low Quarter comprises Berry Moor and the farms and woodlands of the plaintiff abovementioned.

9. An inclosure of the four tracts of waste was commenced under the General Inclosure Act (8 & 9 Vict. c. 118), in the year 1860, and is still pending.

10. The defendants issued their provisional order, under s. 27 of the Act, dated the 25th of April, 1861, and thereby, after reciting that the plaintiff, as lord of the manor of Kirkoswald, was entitled to the soil of the waste lands, they declared that the terms and conditions on which they were of opinion that the inclosure should be made were, amongst other things, "That four acres on Berry Moor, at such spot as the valuer shall select, be allotted for the labouring poor. That one sixteenth part in value of the said lands, to include the ground where the limestone crops out, be allotted under the provisions of the said Act to the plaintiff, as lord of the said manor, in lieu of his right and interest in the soil

of the said lands to be inclosed, exclusively of his right and interest in all mines, minerals, stone, and other substrata under the same. That a right to enter the lands when inclosed, for the purpose of opening, working, or winning such mines, minerals, stone, and other substrata, be reserved to such lord, compensation to be made by the person exercising such right for any damage to the surface which may thereby be done. And that there be reserved to the lord of the manor all manner of game upon the lands to be inclosed, together with the right of hunting, hawking, and fowling over the same, with full power and authority to enter upon the land for the convenient exercise of such right."

11. The claims of persons claiming to be interested in the tracts were duly delivered to the valuer appointed in the inclosure, and, amongst them, the plaintiff claimed rights of common of pasture over all the four tracts for all his commonable cattle, levant and couchant, upon each of the farms and woodlands.

12. The plaintiff's claim in regard to the said farms and woodlands was objected to in the following form:—"Your claim is objected to for Haresceugh Fell, Viol Moor, Tod Bank Hill, for the Mains Farm, Demesne Do., High Bank Hill Do., Woods; for the Parks Farm by Walton; Housegills by Joseph Longrigg. Objected to for Haresceugh Fell and Tod Bank Hill."

13. The valuer made his determination as to the claims, disallowing them in part and allowing them in part. As to the Mains Farm and Fog Close Farm, he disallowed the claim over all the tracts.

14–22. The plaintiff gave notice of dissatisfaction with the valuer's determination, and, upon appeal from the valuer's determination, the assistant inclosure commissioner, to whom the matter was referred, determined, under s. 55, inter alia, that the claim of the plaintiff in respect of the Mains Farm and Fog Close Farm be disallowed.

23. The plaintiff, being dissatisfied with so much of the determination of the assistant commissioner as disallowed his claims, brought this action against the defendants under s. 56.

24. In regard to the Mains Farm, containing 257*a.* 2*r.* 15*p.*, in respect of which the entire claim was disallowed by the assistant commissioner, the arbitrator finds:—

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25. That Mains Farm is situate about three or four miles from Haresceugh Fell. The tenants who held the farm prior to the year 1826 are dead. In the year 1826 John Longrigg took the farm, and held it till 1859. George Carruthers then took the farm, and held it until the year 1866.

26–28. In the year 1828 Longrigg turned a mare from the Mains for one summer to Haresceugh Fell, and also sent some young horses to the Fell at the same time, and they were sent there on more than one occasion. He also sent a pony to the Fell in the summer of the years 1844 and 1845. He also sent from the Mains sixteen or eighteen sheep to the Fell for one summer when he sent the mare there. George Carruthers also sent some sheep from the Mains to Haresceugh Fell during the whole summer of 1859, and also during the years 1860, 1861, and 1864.

29. Occasionally, during the eight years ending about the year 1844, Longrigg turned some sheep from the Mains to Viol Moor, and wintered them on the Mains. They were driven to Viol Moor sometimes through the Parks and sometimes through Housegills. Longrigg did not keep a Fell flock. The way-going sheep on the Mains were not sent to Haresceugh Fell, because there was better pasture on the Mains.

30. In the year 1858, about two years before the commencement of the present inclosure, the plaintiff entered into an agreement with G. Carruthers for letting him the farm, and Carruthers thereupon covenanted to keep up and maintain the right of the plaintiff upon Haresceugh Fell, by sending early and every year more or less stock to depasture on the portions of the waste belonging to the High and Low Quarters.

31. Leases were put in evidence beginning in 1677, by which the Mains Farm, described as demesne lands, was let by the then lord of the manor, "together with all pastures, feedings, commons of pasture, and husbandry ways thereunto belonging." In one of the leases, from Sir C. Musgrave, dated the 28th of September, 1727, the Lodge Park and the Mains, described as demesnes and part of Kirkoswald Parks, were leased to William Richardson for fifteen years, with a memorandum of agreement "that the tenant shall have liberty at all seasonable times of the

year to drive cattle and carry lime through the lands now in lease to David Graham, as soon as the said lease shall expire, to and from the Fell." By another lease from the same to William Bird, dated the 30th of January, 1732, the Old Parks was leased for twenty-one years, with a covenant by lessee to allow William Richardson, farmer to another part of Kirkoswald demesnes, leave twice in the year to drive his sheep through the demised premises, as also liberty to bring his turf that way from the Moor or Fell. By a lease of the 28th of October, 1741, by Sir P. Musgrave to William Richardson, all that part of Kirkoswald demesnes which he now enjoys, called Lodge Park and Mains, were leased for eleven years, with an agreement that the lessee should be allowed at all seasonable times the usual way-leave through the farm called Old Parks, for carting of lime and driving of cattle to and from the Fell, in such sort or manner as he hath already enjoyed the same, and not otherwise. By another lease from the same to Thomas Graham, dated the 7th of April, 1753, the farm called Old Parks was leased for fourteen years, with a proviso that it should be lawful during the term to and for the farmers of the Lodge Park and Mains, and their agents and servants, to carry lime from the Fell through the said farm, and likewise drive the sheep through the same to and from the Fell.

32 and 33. As to Fog Close, containing 422 acres, in respect of which the entire claim was disallowed by the assistant commissioner, shewing considerable user over the Fell by the tenants for the time being from 1807 to 1862.

34. Leases of Old Parks Farm dated, 1767, 1776, 1779, 1785, 1791, respectively, contain a proviso that the tenants of that farm should allow the farmers of the Mains and of Fog Close the privilege of a way through the said farm in as full and ample a manner as they had theretofore used and enjoyed the same.

35–50. Evidence of user as to Demesne Farm and the other farms.

51. It was contended, on the part of the plaintiff, inter alia, that in the circumstances stated in this case he is entitled, independently of any evidence of enjoyment of pasturage by himself or his tenants, to claim as a person interested in respect of a right of pasturage for all cattle levant and couchant on the said

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farms and woodlands. That at all events he is entitled so to claim in respect of such right of pasturage on the demesne lands.

52. That, in the event of the Court determining that proof of any enjoyment is necessary to support the right, it has been shewn by the facts so found that the occupiers of the farms have in right and on behalf of the plaintiff sufficiently used and enjoyed the privilege of depasturing the wastes; and that it is not necessary for him to prove such enjoyment of pasturage as is required by law in the case of commoners claiming rights of common over the lord's wastes; and that it is sufficient for him to give such evidence of enjoyment as would in the case of a right once found to exist be sufficient to rebut an intention to abandon the right, and that at all events these propositions are true of the demesne lands. And it was further contended that, as all the four tracts are waste of the same manor, it must be held that they are all subject to the same rights of common or rights of pasturage as between all the owners of common right land situate within the manor.

54. On the part of the defendants it was contended that the leases, which were produced from the custody of the plaintiff, are not legal evidence to shew that the farms are demesne land of the manor of Kirkoswald, or that any of the farms are entitled to rights of pasturage over the wastes of the manor.

55. It was further contended on the part of the defendants that, inasmuch as the plaintiff is the owner of the farms, and also of the wastes over which his alleged rights of common or pasture are claimed in respect of such farms, all his rights in the tracts are merged in the freehold, or exerciseable only in respect of his ownership of the soil, and that such alleged rights do not separately exist in law. It was further contended that the plaintiff's right, if any, cannot exist independently of user; that the early acts of user were infrequent and wanted notoriety; that the few animals turned on would have escaped the attention of the other commoners, and would not have challenged inquiry; that in the year 1826 the cattle from the farms were not turned on as of right, but in consequence of the want of pasture on the farms; and that no person under the circumstances ventured to object to the trespass. And further that the suspension of the exercise of the right for many years in succession is fatal to the claims, and that the user of late

years took place illegally, and solely in consequence of the inclosure of Kirkoswald wastes or other wastes in the neighbourhood having been contemplated or commenced, and that such user must be discarded from consideration.

56. It was further contended that the right of pasturage, if any, cannot be extended beyond the particular tract or tracts of waste over which it has been actually exercised.

The questions for the opinion of the Court were, inter alia :—

1. Whether the leases, or any of them, are admissible in evidence to shew that the farms of the plaintiff are demesne lands of his manor of Kirkoswald, or to shew that in respect of such farms he is entitled to rights of pasturage over the four tracts of waste or any of them.

2. Whether the provisional order of the Inclosure Commissioners of the 25th of April, 1861, has not debarred the plaintiff from the rights and interests under the inclosure claimed by him.

3 and 4. Whether the valuer or assistant commissioner had any jurisdiction to disallow the claim as to Berry Moor.

5. Whether the rights of common of pasture or rights of pasturage claimed by the plaintiff in the waste land of his manor are not merged in the freehold of the waste land, or exerciseable only in respect of his ownership of the soil; and whether, by reason of such merger, he is not precluded from claiming any rights of pasturage in the waste in respect of the farms which, together with the waste land, are now vested in him.

6. Whether, in order to establish the rights of pasturage claimed by him, it is not necessary that the plaintiff should prove such exercise and enjoyment of the rights as is required by law in the case of commoners claiming rights of common of pasture over the lord's wastes, or whether the plaintiff is entitled to such rights independently of any such user or enjoyment.

8. Whether the plaintiff, in case he has established a right of pasturage over one or more of the tracts of waste in respect of his farms, is not entitled, in respect of the same farms, to similar rights over all the four tracts so lying within and parcel of his manor.

9. And whether, in respect of the farms, or any of them, the plaintiff is entitled to rights of common or rights of pasturage over

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the four tracts of waste, or any of them, so far as he has claimed such rights in this action.

Manisty, Q.C. (with him *Kemplay, Q.C.*), for the plaintiff. The questions principally turn on the construction to be put upon the General Inclosure Act (8 & 9 Vict. c. 118). By s. 27, if, after inquiry, the inclosure commissioners think it advantageous, "they, by provisional order shall set forth the terms and conditions on which the inclosure should be made, . . . and in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed, shall specify the share or proportion of the residue of the land which" (after payment of expenses and allotments for public purposes) "should be allotted to the lord in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in the mines, &c., under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be inclosed, as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed," . . . A valuer is then to be appointed (ss. 33, 34) who is to hold meetings (s. 46), and claims to right of common, &c., are to be delivered (s. 47), and objections to claims are to be delivered within a time to be limited by the valuer, and no objection is to be received afterwards; and the valuer is to hold meetings, and examine and decide upon the claims, subject to an appeal to the commissioners (s. 48), and subject to further appeal by action (s. 56). By ss. 75, 76, the valuer is to allot in pursuance of the provisional order; and after allotting for public purposes and to the lord in respect of his right of soil "shall (s. 77), divide, allot, and allow all the remainder of the land to be inclosed amongst the several persons who shall be interested therein, in such shares and proportions as he shall adjudge proportionate to the rights claimed and allowed.

The plaintiff in the present case is the lord of the manor, and is owner of the soil of the wastes, consisting of four tracts, which it is proposed to inclose, and he is also owner of demesne lands consisting of seven farms. The provisional order directed that one sixteenth part in value of the said lands should be allotted to plaintiff as

lord of the manor, in lieu of his right and interest in the soil of the said lands to be inclosed, exclusively of his right and interest in all mines, &c., under the same, and that there be reserved to the lord all manner of game upon the lands. Claims were sent in, and the plaintiff claimed rights of common of pasturage over all four tracts of waste, in respect of each of the seven farms. Objections were sent in as to some of these claims, but no objection was sent in to rights claimed over one of the tracts, viz. Berry Moor. The valuer disallowed some of the claims, including those over Berry Moor. On appeal the assistant commissioner affirmed the disallowance, on which the present action was brought under s. 56.

In arguing the case it will be sufficient to take the first farm only, "The Mains," which will raise all the questions. The first question is, what does "any right of pasturage which may have been usually enjoyed by the lord or his tenants," in s. 27, mean, coupled as it is with the mines and other substrata, which are beyond all question part of the soil? It must mean the right to the herbage which the lord has as incident to the ownership of the soil, subject only to the right of pasturage in the commoners. And if that be so, then the quasi right of common, which the lord claims as incident to his demesne lands, cannot be affected by the provisional order, but may be claimed as the rights of other persons, altogether independent of his ownership of the soil of the wastes. But assuming the contrary construction, and that this quasi right of common is meant by "right of pasturage usually enjoyed," then, the provisional order being altogether silent as to this right, it must be taken as not included in the award; for the award is in respect of the ownership of the soil of the waste, whereas ex hypothesi this right is in respect of the ownership of the demesne lands. That such a right can exist cannot be disputed: see *Arundell v. Falmouth*. (1) The plaintiff's claim, therefore, so far ought to be allowed, as not precluded by the provisional order. Secondly, did the evidence as to the user prove a right of pasturage usually enjoyed over the Fell by the plaintiff or his tenants of the Mains? The user is but infrequent; this is, however, accounted for by the distance of the farm from the Fell, and the want in the tenant of proper flocks to be turned out: see paragraphs 25–30; but this user, coupled with the

(1) 2 M. & S. 440.

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old leases (paragraghs 31 & 34), would have been sufficient to shew an immemorial right of common, and it is therefore sufficient to support the claim to this quasi right of common "as usually enjoyed." Lastly, the scheme of the Act shews that a claim, if not objected to, must be provisionally allowed by the valuer; and it is not till he comes to apportion the inclosures under s. 77, according to the value of the rights allowed, that he can go into the amount of allotment. Therefore, there being no objection to the right claimed by the plaintiff over Berry Moor, the valuer and assistant commissioner had no jurisdiction to disallow it.

[He then went shortly through the other claims which had been disallowed.]

Herschell, Q.C. (with him *F. M. White*), for the defendants. The right of pasturage mentioned in s. 27 is that quasi right which is recognised as existing, though not strictly a right of common, in respect of farms purchased by the lord who is also owner of the waste: *Lloyd* v. *Powis* (1); and the right of the lord to put his cattle on the waste in respect of ancient demesne lands is not aptly described as a "right of pasture usually enjoyed by the lord or his tenants."

[BLACKBURN, J., referred to *Musgrave* v. *Forster*. (2)]

Secondly, the provisional order expressly excluding the plaintiff's right and interest in the mines, and also reserving the game to him, but making no mention of the right of pasture, must be taken to have included it in the allotment of one sixteenth. The section empowers the commissioners to include all these rights, and if not expressly excluded they must be taken to be included. Next, "Usually enjoyed" must be taken to mean a regular continuous enjoyment without interruption down to the present time, and not merely such a user or enjoyment as would support in evidence a claim to an immemorial right of common. Such a right of common once shewn to exist could not be lost by any amount of nonuser; whereas "usually enjoyed" must mean generally and regularly enjoyed. Of that there is no evidence here. Nor would the evidence be sufficient to support an immemorial right of common. Lastly, the valuer and assistant commissioner had jurisdiction to disallow the claim over Berry Moor, although no objection had

(1) 4 E. & B. 485; 24 L. J. (Q. B.) 145. (2) Law Rep. 6 Q. B. 590.

been sent in. By s. 48, "after the time limited for the delivery of claims shall have expired," fourteen days' notice is to be given "of the meeting for the examination of such claims;" "and at such meeting the valuer shall proceed to examine into and determine such claims, and shall and may allow or disallow the same." The words are quite general, and the disallowance is not confined to claims which have been objected to. Primâ facie evidence of the right claimed must be given, whether the claim be objected to or not, before it can be allowed.

Manisty, Q.C., in reply. Sect. 48 shews that all the proceedings as to allowance and disallowance of claims are merely preliminary; and the final allotment is not till afterwards, under s. 77, and then "the valuer shall divide, allot, and award all the remainder," i.e., after the allotment to the lord, to the poor, &c., "of the land to be inclosed unto and amongst the several persons who shall be interested therein in such shares and proportions as he shall adjudge and determine to be proportionate to the value of their respective rights and interests which shall have been claimed and allowed under the provisions hereinbefore contained."

BLACKBURN, J. The first thing to understand, which is one of a general character, is the Inclosure Act, and particularly s. 27. The scheme of the Act is, that the lord of the manor has a veto upon inclosure altogether; an inclosure cannot be made unless a majority of the persons out of the whole number interested assent to it; and it cannot be made unless the inclosure commissioners think it proper that it should be made on the terms proposed. Therefore the provisional order which the commissioners make contains the terms which they are willing to sanction, and which, if the lord of the manor do not veto, will be good as regards him, and which, if the statutable number of the commoners assent, will be good as against them. So that the provisional order really is a record of the terms on which the inclosure is to proceed. The 27th section has this, among other enactments, that "in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed,"—which is generally the case,—the commissioners in their provisional order "shall specify the share or proportion of the residue of the land which, after provision made for the pay-

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ment of expenses, &c., and after deducting the allotments to be made for public purposes, should be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stones, and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be inclosed, as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed."

We have first to see what is the meaning of those words, "right of pasturage which may have been usually enjoyed by such lord or his tenants." The lord is by the supposition in this part of the section owner of the soil in the waste proposed to be inclosed. As such owner of the soil, as part of it, he would have the minerals. The legislature, in terms which are not so accurate as might be, has provided that the allotment to be awarded in the first instance to the lord may be given either exclusively or inclusively of his right and interest in the minerals; and then come the words, "or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants." What is the meaning of that? The owner of the soil, unless there be something to the contrary, as pasturage of course is incident to the soil, enjoys it as part of it. When it is subject to the rights of common in other persons, he still has that right, subject always to this, that he must not exercise it to such an extent as to interfere with the rights which by his ancestors were granted originally to the different persons in respect of whose lands there is that right of common. But it may happen, and constantly does happen, that the lord, besides that right of pasturage which he has as owner of the soil, having become proprietor of a farm to which there is a right of common attached, he or his tenants continue to deal with the right of common over the waste in respect of the farm as if the right still existed, though by the technical rules of English law when the owner of the fee simple of the dominant hereditament is also the owner of the waste ground in which the right of pasture is exercised he can have, strictly speaking, no such right at all. In cases

where the land has been parted with by the lord and so severed and then again attached in different portions, as where the lord buys back a farm, and instead of having it conveyed back to trustees, takes a conveyance to himself, he de facto, as continually happens, loses the right of common. At the same time it is not an uncommon thing—and I take it to have been the case in the present instance—that the lord has farms on parts of the estates which have never been separated from the main estate, demesne farms that have always been his freehold, and which, therefore, never could strictly acquire the right of common. Nevertheless, that distinction not being recognised by those who practically managed these things in the days of old, the tenants of these demesne lands under the lord did enjoy the same rights of common over the wastes as those persons to whom lands had been conveyed; and they did de facto enjoy and use the rights of common, just as if the freeholder of the demesne lands was not possessed of the freehold of the land over which the right of common was used. Looking at this enactment with a view to the existing de facto rights of that sort, I cannot construe the Act of Parliament, when it says, "right of pasturage which may have been usually enjoyed by such lord or his tenants," as meaning anything else than rights of pasturage and common which have been enjoyed by the lord and his tenants in such a manner as, if it were not for this technical rule—that the lord, being the freeholder of the dominant tenements and of the soil of the waste too, cannot have a right to common—would prove an established right beyond the memory of man to common over the waste in question. That is what I think is meant by the statute, and that being so, the statute seems to me to say, that by the provisional order the commissioners may either make an allotment for the lord's interest in the soil in that waste which is going to be inclosed, which allotment shall include any right of pasturage which he may have of the nature I have spoken of usually enjoyed by him, so as to get rid of the whole thing and have done with it in that way, if the commissioners think fit to include it; or they may say in the provisional order, we will allot so much to the lord for his right and interest in the soil, but we will exclude from it any of those rights of pasturage that have been usually enjoyed by him or his tenants, leaving him to come

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in and claim for those rights exactly as he would have done, if, instead of the dominant tenements or farms in respect of which he claimed being in his own hands, they had happened to be held by others in trust for him, so as to keep the legal estate in the waste and the legal estate in the farms separate and distinct. That being so, the commissioners could award in either way in the provisional order, and the question arises whether, under this particular provisional order, these rights are included or excluded; for it follows, if we hold that the provisional order has said that the lord is to have this allotment in lieu, not only of his interest in the soil, but also of these quasi rights of pasturage, that having assented to the order, and the inclosure going on on those terms, even if it was the fact that he once had that quasi right of common of pasturage, it would be gone.

Now, those who framed the provisional order have put it in these terms: they grant the lord "one sixteenth part in lieu of his right and interest in the soil of the said lands to be inclosed exclusively of his right and interest in all mines, &c.;" and they are absolutely silent as to "other rights," if any there be, of the lord, or as to "right of pasturage which may have been usually enjoyed by the lord or his tenants." The question, therefore, is, if there are such rights in existence, and the provisional order does not say they are to be included in the allotment which is given as compensation, and does not say that they are to be excluded from the allotment which is given as compensation, are they to be taken as included or excluded?

When we have a right, which, except for the legal technical objection that the same person is freeholder both of the dominant and servient tenement, would be quite a separate right independent of the soil, a kind of right which, if it was in a third person or trustee for the lord, would not be considered an interest in the soil, but would be a matter in which an allotment would have to be made afterwards according to the value, unless there is something in the order to indicate an intention to include it, I cannot say that I think we ought to consider that the provisional order does include it. The words are to be carefully considered "inclusively or exclusively of any right of pasturage which may have been usually enjoyed by the lord or his tenants;" that is, rights of pas-

turage, just as they would have been if these farms had been in a trustee for the lord, "usually enjoyed" meaning enjoyed so long as would have established that right as against the rest of the tenants of the manor and the commoners, which would generally be from time whereof the memory of man runneth not to the contrary.

What we have next to consider is, whether it is proved that in respect of these different farms there was such a right over any or all of these wastes as would be covered by the terms "right of pasturage usually enjoyed by such lord or his tenants." I cannot agree with what Mr. Herschell has argued, that that means continuously enjoyed, without let or interruption for a year, down to the present day. I think that when, under s. 77, the valuer comes to make allotments as he is directed to do "according to the value of the respective interests which shall have been claimed and allowed," it would be a fair question to submit to the valuer, that, though it is established that this particular farm has had a right of common from time immemorial (supposing that is established), yet as the fact is shewn that for twenty years or more, being perhaps at a distance from the place, or from some reason or other, the occupiers did not think the right worth exercising, the right is of very little value. The allotment is to be according to the value of the right, not according to the value of the farm. And the other parties interested may very well say to the valuer, "When you make an allotment according to the value of the right, take into consideration the small use that has been made of it;" and the claimant, on the other hand, may give reasons for making the allotment larger. But I cannot think, if it is shewn to our satisfaction that the right had been enjoyed so long as to be established, that the mere fact that it has been neglected and has fallen into desuetude of late years prevents the claimant having that right to an allotment in compensation, be the same much or little, according to its value.

First, as to the Mains Farm: As to that, it is shewn on the evidence that since the time of the first tenant now living there was user, though but slight, over the Fell. It was actually used in 1828, in 1844, and 1845, and it has been used at some time quite recently, just before and since the inclosure began. The user is but slight, but still there was user over the Fell. Then we have

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a series of leases that have been produced. I quite agree that these of themselves will not establish the right. They are documents produced to give evidence of title, and coming from the proper custody, we must take it that they were executed and acted upon by those who took possession of the farm under them to this extent, that the tenant took the farm upon the terms mentioned in the lease, and the landlord granted it upon those terms. Of course it is quite possible a man might grant a lease in which he expressly gave a person a right of common over his neighbour's adjoining land, and the tenant might take the lease with this grant, but never put it in force or act upon it; and it would give no title at all. But when you shew in modern times user, though slight, and in ancient times that the landlord professed to grant and the tenant to take the right over the waste, that greatly strengthens the modern user, and shews that it was probably an ancient user. And taking that view I cannot but find that there was a right in respect of the Mains Farm over the Fell. It appears that the lord of the manor granted leases of Mains with rights of common and pasture, which might or might not be over the Fell; and after a time we find him agreeing with the tenant of Mains and stipulating that the tenant shall have a right of way, as soon as the lease of a particular farm falls in, to take his cattle to and from the Fell, and fetch lime from the Fell; and that is followed up by the tenants of the other farm, over which the landlord stipulated to give that right to the tenant of Mains, taking leases with a proviso as to this right of way over the farm. Then if we find a modern user, slight, it is true, but a modern user in 1828 and a further new user afterwards, the nonuser being explained by shewing that the tenant of Mains had no Fell flock, no such sheep as he would wish to drive out on the Fell, I think we must come to the conclusion that the right did exist. We find that the tenant of Mains, as far back as 1677, and from thence downwards, had always, as part of what the landlord let to him, the right of pasture, and when we thus find that for nearly 200 years he had that right, the reasonable conclusion is that it is an immemorial right, and if an immemorial right, I come to the conclusion that Mains has a right of pasture over this Fell "usually enjoyed." But over Viol Moor the evidence of user in paragraph 29 is very

slight and not sufficient. As to Todd Bank there is no evidence at all. In the same way, as to the farm Fog Close, the evidence establishes the right over the Fell, but not over the other two wastes. [The learned judge then went shortly over the evidence as to the other farms.]

Then comes the question, which applies to all these seven farms, as to the right of pasture over Berry Moor. The question being, where a claim was sent in to pasture over these different wastes, and there was no objection made to the claim as far as regards Berry Moor, can the valuer and the assistant commissioner afterwards, of their own motion, without any objector, say: We disallow the claim in respect of this waste? At first I had taken the impression, which Mr. Manisty has satisfied me was erroneous, that the valuer at the same time that he settled whether the claim should be allowed settled how much he would allot in respect of it. If that had been so, I felt very strongly that, though no one has a right to interfere or speak to him about it, he must look into the claim for himself. But when we look into the Act, we find that claims are to be allowed or disallowed subject to appeal, and then, by s. 77, that when they are all settled, and not till then, allotments are to be made amongst the parties interested, "according to the value of their respective rights and interests, which shall have been claimed and allowed under the provisions hereinbefore contained." Consequently, that removes the difficulty which pressed upon my mind; and what we must now consider is, whether these rights, being claimed, ought to have been allowed, their value being a matter hereafter to be determined. And when it is carefully provided that all parties interested shall have the right to object and the claims be investigated afterwards, it certainly seems to me that a claim should be considered as admitted, if not objected to during the time when they are considering whether claims shall be allowed or not; and that consequently the valuer and the assistant commissioner had no right to enter into the question and disallow the rights claimed and not objected to; and that we should take it, as far as Berry Moor is concerned, that the claimant is entitled to the right of common. The amount is very small, but twelve acres, of which four are allotted for public purposes, so that eight acres only are to be divided among the

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claimants in respect of these extensive farms. The result I come to is that they should not have disallowed the claim, and that, consequently, the lord of the manor was entitled to the right he claims in respect of Berry Moor.

DENMAN, J. I do not think it necessary to add anything to the judgment of my Brother Blackburn. I entirely agree with him on every point. As to s. 27, and the meaning of the provisional order, I think it is perhaps important to lay down a general rule, that when such important rights are concerned the mere omission to mention anything is not to be considered an inclusion of it.

ARCHIBALD, J., concurred.

Judgment accordingly.

Attorneys for plaintiff: *J. L. Morris, for Bleaymire & Shepherd, Penrith.*

Attorneys for defendants: *White, Borrett, & White.*

Feb. 2.

ALLAN AND OTHERS, APPELLANTS; THE OVERSEERS OF LIVERPOOL, RESPONDENTS.

INMAN, APPELLANT; THE ASSESSMENT COMMITTEE OF THE WEST DERBY UNION AND THE OVERSEERS OF KIRKDALE, RESPONDENTS.

Poor-rate—Exclusive Occupation — Non-rateability of Person to whom Dock Accommodation, with user of Sheds, Quay Space, &c., is allotted—Occupation reserved to Owner.

By the Mersey Docks Act (21 & 22 Vict. c. xcii.), the board, under whose control the docks are, may, from time to time, upon such terms and on payment of such rates or other sums of money, and subject to such restrictions and regulations as they think proper, set apart and appropriate any particular portion of any dock, quay, warehouses, or sheds, for the exclusive accommodation and use of any company, firm, or individual engaged in carrying on any particular trade, who shall be desirous of having such exclusive occupation for the reception of their vessels; and the board have power of imposing a quay rent by way of penalty on goods remaining beyond a certain time on any quay.

In consequence of an application from the appellants, a steamship company, the board by letter, "appropriated for the use of their steamers certain berths, with the sheds attached, affording a lineal quay space of about 680 feet, and fixed a charge of 2*s.* 6*d.* per square yard per annum for the use of the shed space from the date of the occupation. It is to be understood that this is a provisional agreement only, and made during the pleasure of the board." The appellants

entered under the above letter, and used for several years the quay space and sheds for loading and discharging their steamers. The sheds were in one range, under a continuous roof, and subdivided by partitions into a store shed, a transit shed, and two open sheds. In the centre was the transit shed, being generally open, but having doors, each with two locks, and when goods subject to duty were placed there the doors were kept locked at night, the key of one lock being kept at the custom house, the key of the other kept by the appellants. Occasionally, when an appropriated berth was not occupied by any of the appellants' steamers, it was used, under the direction of the dock master, by other vessels, which vessels then also used the quay space and sheds attached to the berth, without the consent of the appellants being asked. The board also exercised their right of enforcing payment of the penal quay rent on goods not the appellants', allowed to lie too long on the quay space appropriated to the appellants; and the board retained this rent, and did not account to the appellants for it.

The board also appropriated to the appellants a further space as a coal depôt, by a resolution, "That it was to be used for no other purpose and on sufferance only, upon their agreeing to pay one penny per square yard per week, and engaging to remove the coal at any time upon one week's notice." Afterwards the manager of the board having reported that the appellants had occupied more space than the land "rented" by them, and suggested that the "rent" for the whole space should be charged from a past day named, and the appellants having written a letter agreeing to pay the "rent" from that date, the board approved the report and letter, "the rate of rent and terms and conditions of tenancy being the same as heretofore."

The appellants having been rated to the poor-rate in respect of their alleged occupation of the above premises, on appeal:—

Held, that the board had not parted with the exclusive possession to the appellants, and that the board therefore, and not the appellants, were rateable.

CASES stated under 12 & 13 Vict. c. 45, s. 11, on two appeals against certain poor-rates, in which was the name of the Mersey Docks and Harbour Board as co-respondents. It was agreed by all the parties that the name of the board should be omitted from the cases, they having undertaken that if the Court should be of opinion that the board should have been assessed instead of the appellants respectively, and that the name of the board can now legally be inserted in the rate in lieu of that of the appellants, they will admit that all proper notices have been given and respites made to enable the Court so to insert their name.

ALLAN *v.* LIVERPOOL.

In a rate for the parish of Liverpool, of the 14th of May, 1872, the appellants were assessed in respect of their alleged occupation

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of (amongst other premises) certain sheds situate at the Wellington Dock, in the gross rental of 600*l.*, and a rateable value of 540*l.*

1. The appellants are the managing owners of the Montreal Ocean Steamship Company, who own a line of steamers regularly plying to and from Liverpool.

2–4. The system of docks at Liverpool is under the control of the Mersey Docks and Harbour Board (hereafter called the board), and is managed by them under their Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), and certain bye-laws made thereunder, which Act and bye-laws were to be referred to as part of the case.

By the Interpretation Clause (s. 3) "the word 'docks' shall mean the present or future docks, basins, locks, cuts, entrances, graving docks, quays, piers, warehouses, sheds, roads, lands, and other works belonging to or under the management of the said board;" . . .

By s. 63: "The board may from time to time appropriate particular docks, or portions of the same, to the use of steam vessels, either exclusively or in conjunction with sailing vessels, or to the use of any vessels engaged in particular trades, or to the use of any other vessels or class of vessels, or under any other circumstances which, in their judgment, may render such appropriation expedient."

By s. 64: "The board may from time to time, if they shall deem it expedient, but not otherwise, and upon such terms and conditions, and upon payment of such rents or other sums of money, and subject to such restrictions and regulations as they shall think proper, set apart and appropriate any particular portion of any dock, wharf, quay, warehouses, sheds, or other works, with the appendages thereto, for the exclusive accommodation and use of any canal or railway company, or of any company or firm or individual engaged in carrying on any particular trade, who shall be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed and conveyed by them: Provided that every company, firm, or individual to whom such exclusive accommodation as aforesaid shall be afforded, and their vessels, crews, servants, and other persons employed by them or under their control, shall be subject to the general rules and regulations of the board applicable to their docks, wharves, warehouses, sheds, and works, and the vessels entering the same, and the crews and other persons employed in and about such vessels."

By s. 82: "The board may construct such depôts and sheds for the reception of goods, and may construct and erect such steam engines, cranes, hoisting and weighing machines, and other apparatus for facilitating the loading and discharge or the masting or unmasting of vessels, and tanks for watering horses and cattle, and may provide such other conveniences upon or near the quays as they shall think expedient for the accommodation of the trade of the port of Liverpool, and may make reasonable charges for any such depôts, sheds, steam engines, cranes, hoisting and weighing machines, and other such apparatus and conveniences as aforesaid, and may let any such sheds and also any portion of the quays which, with or without such sheds, they may think fit to appropriate as special berths for ships in any particular trade or otherwise, for such periods, and at and on such rents, terms, and conditions as they may deem expedient.

5. Previously to the month of May, 1862, application was made to the board by the appellants for an appropriated berth, and other accommodation, for their line of steamers, and thereupon the board caused to be sent to the appellants the following letter of the 17th of May, 1862:—

I beg to inform you that the Dock Board has appropriated for the use of the steamers owned by you the south side of the Wellington Dock, with the sheds attached, affording you a lineal quay space of about 680 feet, room to be reserved for working the east quay, and has fixed that a charge of 2*s.* 6*d.* per square yard per annum be made for the use of the shed space, such charge to commence from the date of your occupation. It is to be understood that this is a provisional agreement only, and made during the pleasure of the board. The Harbour Master will notify you as soon as the premises are ready for your occupation.

6. In pursuance of the above letter, and without any further authority, the appellants have since May, 1862, used and still continue to use, for the purpose of the loading and discharging of their steamers, the berth quay space and sheds thereby appropriated to them, paying the charges therein stipulated. The sheds which are constructed on the quay consist of a range of sheds covered by one continuous roof and subdivided by partitions reaching to the roof into a store shed, a transit shed, and two open sheds. The store shed is at the east end of the range of sheds, and is provided with doors and locks, and is used by the appellants for holding stores necessary for their ships when in port. The transit shed is situate at about the centre of the range of sheds, having open sheds at each end of it. There are sliding doors communicating at each end with the open sheds, and one on each side communicating with the roadway and the dock respectively. The shed is used for the reception of goods liable to duty, but on which no duty has at the time been paid. The open sheds are situate one at the east end, and the other the west end of the transit shed. On the side next the roadway are sliding doors by which these doorways can be closed from the road (although this is never wholly done except at night). The side next the dock is only partially fitted with sliding doors, there being thirteen spaces and only ten doors which slide from end to end, and to this extent the shed is open and may be entered at any time by persons passing round the end of the shed and along the edge of the dock. These sheds are used for the temporary deposit of goods landed from or about to be shipped on

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vessels lying in the adjoining berth. At the west end of the range is a lock-up office consisting of four rooms in the exclusive occupation of the appellants and their employés for the transaction of shipping business. All the sheds are kept in repair by the board.

7. The Liverpool docks are used by a great number of foreign-going and coasting steamships, and to almost all of these lines berths with sheds and quay space are appropriated by the board. When any such berth is not actually in use by any steamer of the line to which the same is specially appropriated, it may be and is occasionally, but rarely, under the direction and by the authority of the dock master, used by other vessels without reward to the owner of such line, and without his consent. Vessels thus permitted to use berths appropriated to particular lines are also entitled to use and do use the quay space and sheds attached to and enjoyed with each appropriated berth. Any steamer of the line to which such berth has been appropriated requiring to use such berth, shed, or quay space, whilst the same is being used by such other vessel, is compelled to wait until such other vessel is completely loaded or discharged before she can obtain the use of such berth, quay space, and sheds.

8. In addition to the use of the berth and sheds in the last paragraph mentioned it is usual and customary, when such appropriated berth is not occupied by a steamer of the appellants, for the dock master, without consulting the appellants, to put into the berth vessels waiting for a berth at the Wellington Dock coal tips; and such vessels, whilst lying in the berth, often receive on board their stores, water, and other articles which are brought alongside through the sheds in carts.

9. By virtue of s. 88 goods which have been more than forty-eight hours upon any dock quay are liable to pay a rental to the board of 5*s.* per hour. Goods so lying in the appropriated sheds are liable to this charge, whether they be the goods of those to whom the sheds are appropriated or of any other person. (1) Such charge has sometimes, at the instance of the appellants, been

(1) There are similar but fuller powers given under ss. 27, 29, 30, 32 and 35 of the Act of 1861 (24 & 25 Vict. c. clxxxviii.): see par. 12 of the other case.

exacted by the board and paid to them by the owners of goods, not the property of the appellants, but deposited on landing from the appellants' vessels in the sheds appropriated to them.

10. When the consignees of goods discharged out of the appellants' steamers desire, as they not unfrequently do, that such goods may remain upon the appropriated shed or quay space at an ordinary quay rent, they make their arrangements with the board only, and pay the rent to the board; but no such arrangement is made by the board if the quay space is required in connection with the discharge or loading of other vessels. It is only when such goods interfere materially with the working of the appellants' steamers that the appellants call upon the dock board to exact the penal rent aforesaid. The board has not accounted, nor is it accountable to the appellants, for money so received by the board, as in this or the last paragraph mentioned.

11. The sheds and quay space, except the store shed, are continually traversed by horses, carts and workmen engaged in and about the loading, discharging, or repairing of vessels lying in the berth appropriated to the appellants. They are also traversed by all persons going to or from any ships moored outside of the said berth, or to or from that part of the dock.

12. Each door of the transit shed has two locks; the key of one lock is kept at the Custom House, and the key of the other by the appellants. Whenever a vessel is discharging, and at all times during the day, the transit shed is open, and the servants of the board go in continually, at their pleasure, for the purpose of examining the goods and seeing that the bye-laws of the board are observed, or for any other purpose connected with their duties. When the sheds contain goods or ship stores belonging to the appellants they are watched at night by watchmen employed by them.

13. All sailing vessels and steam vessels which come to the port at regular intervals are loaded and discharged at berths provided with sheds of the same kind as those above mentioned; but the owners or agents of such vessels have no right to the preferential use of any berth or shed, nor are they required to make any payment equivalent to the 2*s.* 6*d.* per yard charged as above mentioned for an appropriated berth.

The question for the Court was whether or not the appellants

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are liable, as occupiers of the shed space, to be assessed to the relief of the poor, and to pay the rate appealed against in respect of such assessment, or any part thereof.

Judgment may be entered in the court of quarter sessions in conformity with the decision of this Court, and for such costs as this Court may adjudge.

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IN a poor-rate for the township of Kirkdale the appellant was assessed in respect of his alleged occupation of (amongst other premises) a coal depôt and certain transit sheds situate at the Huskisson Branch Dock.

1. The Huskisson Dock and Huskisson Branch Dock, their wharves, quays, and sheds, are a part of the estate of the Mersey Docks and Harbour Board, and are wholly within the township of Kirkdale. The docks are surrounded by a quay, and on different parts of the quay are large sheds, placed there for the convenience and protection of the shippers and consignees of goods shipped from or unloaded on the quay.

2. The fourth part of the Mersey Docks and Harbour Board Consolidation Act (21 & 22 Vict. c. xcii.) relates to the management of the docks and quays of the Liverpool docks. The Act and the bye-laws made thereunder, and the Mersey Docks Act, 1861 (24 & 25 Vict. c. clxxxviii.), were to be taken as part of the case.

5. The appellant is the managing owner to the Liverpool, New York, and Philadelphia Steamship Company, and as such, for the purposes of this case, is to be taken to be the owner of the said company's line of steamers plying between Liverpool and New York, and commonly called or known as the "Inman line."

On the 22nd of October, 1861, application was made to the board by the appellant for an appropriated berth and other accommodation for his line of steamers, and thereupon the board caused to be sent to the appellant the following letter of the 17th of May, 1862:—

I beg to inform you that the dock board has appropriated to the use of the steamers owned by you one quay and stage berth on the south side of the new Huskisson Branch Dock with the sheds, Nos. 5, 6, and 7, affording you a lineal

quay space of about 544 feet, and has fixed that a charge of two shillings and sixpence per square yard per annum be made for the use of the shed space, such charge to commence from the date of your occupation. It is to be understood that this is a provisional arrangement, and made during the pleasure of the board. The harbour master will notify you as soon as the premises are ready for your accommodation.

7. The appellant subsequently required further accommodation for his line of steamers, and accordingly, on the 2nd of March, 1864, a resolution was passed by the board, which was entered in the minutes of the board as follows:—

The question of the arrangement of the berth on the south side of the Huskisson Branch Dock having been considered, and letters from Messrs. McIver, Messrs. Bibby, and Mr. Inman having been read, it was resolved that the berth now occupied by Messrs. Bibby be withdrawn from them. That Messrs. McIver have the sheds, Nos. 1, 2, and 3, with the quay space fronting them, and that the shed No. 4 and its quay space be added to the berth now occupied by Mr. Inman. That in consequence of this arrangement Mr. Inman is no longer to have the occasional use of the Huskisson Dock, and the berth in the Sandon Dock, now occupied by Messrs. McIver, is to be withdrawn from them. These resolutions to be carried out by the harbour master as soon as possible.

This resolution was confirmed by the board, and notice of the resolution and its confirmation was given by the board to the appellant. The area of the transit sheds, Nos. 4, 5, 6, and 7, or, as they are called, "shed space," mentioned in the foregoing letter and resolution, and thereby appropriated to the appellant, is 6242 square yards. The annual payment made to the board for the same is 780*l.*, and is called "rents" in the debit note sent in by the board to the appellant in respect of part of the sheds.

8. In pursuance of the above letter and resolution and by no other authority, the appellant has, since May, 1864, used, and still continues to use, for the purposes of the loading and discharging of his steamers, the berth, quay space, and sheds appropriated to him, paying the charges stipulated. These charges are paid in addition to the ordinary tonnage rates which are paid by the appellant in respect of the use of the docks by his steamers.

9. The Huskisson Branch Dock, No. 1, is surrounded by a continuous series of sheds or compartments erected on the quay of the same description as those hereinafter described, and which have been used by the appellant as herein mentioned, on all sides, except the west, on which it opens into the Huskisson Dock.

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These sheds or compartments are divided the one from the other by partition walls at right angles to the line of the dock quay. The berth adjacent to and co-extensive with such sheds, and used therewith, is sufficient for the berthing at the same time of two of the appellant's steamers. All these sheds are similar in construction and arrangement, and are very spacious and lofty. The walls are of brick and the roofs slated, the division or partition walls between the compartments are also of brick. Each compartment has three sliding wooden gates or doors on the side next the dock, and two of such sliding wooden gates or doors on the side next the road. There is in each division or partition a wall, separating the compartments the one from the other and running at right angles to the line of the dock as above mentioned, a similar sliding-gate or door affording access from one to the other along the whole continuous series. Each shed or compartment is capable of being separately closed and shut off from the rest on all sides, or the whole four may have the internal communication with one another open and be closed on the outside. Each of these gates or doors, whether in the outer or partition walls, is provided with two locks. The object of the two locks is this, viz., that if any goods liable to duty are discharged from the steamers, they may be temporarily placed in some one or more of the sheds, as in a bonded warehouse, until duty is paid, and in such a case all the gates of the particular shed in which the goods are so deposited are locked, the key of one lock being kept by the appellant, and the other by the customs authorities. The officers of the board do not keep keys of the said sheds, but they are entitled at any time in the course of their duty to enter and examine the same. These customs arrangements are provided for by ss. 77 and 79 of the Act, and in part 7 thereof provisions are made with respect to transit sheds and warehouses.

10. Besides the berth, quay space, and sheds appropriated to the appellant by the said letter and resolution, a further space was appropriated to the appellant as a coal depôt by the following resolution of the board dated the 15th day of October, 1856:—

Read letter from Mr. William Inman agreeing to the conditions on which 400 square yards of ground on the east quay of the Huskisson Dock, opposite the berth occupied by the Philadelphia line of steamships, has been allotted to him

for the purpose of stowing coals for the use of those steamships, viz., that it shall be used for the purpose stated but for no other, upon sufferance only, upon his agreeing to pay one penny per square yard per week for the use of the same, and engaging to remove the coal and clear the ground at his own expense at any time upon one week's previous notice being given.

On the 27th day of January, 1869, the following resolution of the board was passed and communicated to the appellant:—

A report from the traffic manager of district A, stating that the coal bank of Mr. W. Inman, on the land rented by him from the board, situate between the customs depôt at the Huskisson Dock and the west wall of the Sandon Graving Docks, has fallen down and gradually encroached on the surrounding space; and a communication from the engineer, stating that the land now occupied for the storage of coal, and by an office, shed for stores, and a quantity of planks makes a total area of 1140 square yards, and suggesting that the rent therefor should be charged from the 1st of October, 1868; also a letter from Mr. Inman, agreeing to pay rent on the said area from the date in question, were read and approved, the rate of rent and terms and conditions of tenancy being the same as heretofore.

At the time of the making of the rate in question the whole space of 1140 yards was used by the appellant in pursuance of the above resolutions as a place for the temporary storage of coal about to be loaded upon and consumed in his steamers. The space is not railed round, or fenced, or covered in, and the board and their servants are at liberty at all times to enter upon and examine the same. It was at the time of the making of the rate covered with coal, except at the south-west corner thereof, where there are two wooden huts or sheds, one used by the appellant as an office for the accommodation of a clerk engaged about the coals, and the other as a shelter and tool house for the men engaged upon the coals. The former shed rests upon wooden pegs not let into the ground. The latter is supported by four wooden corner posts or uprights, which are let into the ground. The further space is described in the rate as coal depôt.

11. [Similar to paragraph 7 of the other case.]

12. By virtue of the Act of 1861, ss. 27, 29, 30, 32, and 35, goods which have, without the permission of the board, lain upon any dock quay after four o'clock in the afternoon of the second day after landing the same, are liable by way of penalty to pay a rental to the dock board at the rate of 5s. per hour, and after four o'clock in the afternoon on the third day after landing are liable to pay a like rental of 10s. per hour. Goods so lying upon appro-

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priated sheds or quay space are liable to this charge whether they be the goods of those to whom the quay space is appropriated or of any other person. This rent has on thirteen occasions during the twelve months preceding the making of the said rate, but always at the instance of the appellant, been imposed by and paid to the board in respect of goods, not the property of the appellant, but deposited on the quay space appropriated to him. The board have never accounted, or offered to account, nor are they accountable, to the appellant for money so received. They put their powers in force at the request of the appellant in order to compel the owners to remove their goods from the space so appropriated by the board to the appellant.

13. [Similar to paragraph 10 of the other case.]

14. The sheds when open, and the whole of the quay space appropriated as aforesaid to the appellant, are continually traversed by horses, carts, and workmen engaged in and about the loading, discharging, or repairing of vessels lying in or outside the berth appropriated to the appellant, and by foot passengers to or from any part of the docks. Whenever a vessel is discharging, and at all times during the day the said sheds are open if necessary, and the servants of the dock board go in continually and at their pleasure for the purpose of examining the goods therein, or for any other purpose connected with their duties.

15. All sailing vessels and steam vessels which come to the port at irregular intervals are loaded and discharged at berths provided with sheds of a similar description to those above mentioned, or of some other construction answering the same purposes; but the owners or agents of such vessels have no right to the preferential use of any berth or shed, nor are they required to make any payment equivalent to the 2*s.* 6*d.* per yard charged as above mentioned for an appropriated berth.

16. The Mersey Dock Board is assessed for the poor-rate by the respondent township, and by other parishes or townships in which their said estate lies, in respect of their property generally, and such assessment is based upon the receipts of the board as shewn in their accounts, which receipts principally arise from general dues levied by the board upon all vessels and goods in the Liverpool docks; but many questions, as to the proper mode of

the said assessment and the amount thereof, are still open and pending. The basis on which such assessment should be made is contested by the dock board, and has not yet been decided. The payment received from the appellant by the board in respect of the sheds and coal depôt is deducted from the receipts above mentioned in calculating the assessment of the board as it now exists in the respondent township. The appellant has been rated and paid rates in respect of his occupation of the said sheds and "coal depôt" since the passing of the above resolutions.

17. The question for the opinion of the Court was, whether or not the appellant was liable, as occupier of the sheds and coal depôt, to be assessed to the poor-rate and to pay the rates appealed against, in respect of such assessment or any part thereof.

Judgment may be entered in the court of quarter sessions, in conformity with the decision of this Court upon the above question, and for such costs as the Court may adjudge.

Jan. 24. *Milward, Q.C.* (*Sir J. B. Karslake, Q.C.*, and *Gully*, with him), for the appellant Allan, referred to *Reg.* v. *Morrison* (1), and *Roads* v. *Trumpington.* (2)

Littler, Q.C. (*Batten* with him), for the respondents, the parish of Liverpool, cited *Reg.* v. *St. George's Union* (3), and *Reg.* v. *Stevens* (4), as shewing that the reservation by the landlord of a right of entry for certain purposes did not prevent the lessees from being rateable occupiers.

Manisty, Q.C., for the appellant Inman.

Feb. 2. *Aspinall, Q.C.* (*F. M. White* with him), for the respondents, the parish of Kirkdale.

Gully, was heard in reply.

BLACKBURN, J. This case involves difficult questions of fact, but if we get at the facts I do not think there is any difficulty at all about the law. The poor-rate is a rate imposed by the statute on the occupier, and that occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to bring an action of trespass for it. A lodger

(1) 1 E. & B. 150; 22 L. J. (M.C.) 14.
(2) Law Rep. 6 Q. B. 56.
(3) Law Rep. 7 Q. B. 90.
(4) 12 L. T. (N.S.) 491.

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in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass quare clausum fregit, the maintenance of the action depending on the possession; and he is not rateable. So it is with an inmate of an inn; and there are many other cases all of which were alluded to in the case of *Smith* v. *St. Michael, Cambridge.* (1) Taking all these examples together, it is quite clear that what we have to see is, whether or not the board parted with the exclusive possession of the premises, the subject of the rate to the persons who have been rated, in the one case Messrs. Allan, and in the other Mr. Inman, so as to make them respectively the occupiers in the sense I have stated. In order to ascertain this, we must see what was the intention of the parties, and that depends not so much upon what words may have been used in the documents employed; for the word "let" may have been used without there being a letting, and the word "let" may have been carefully avoided, and yet it may appear that in fact the occupation has been parted with. What we have to look at, taking all the circumstances together, is, to see whether or not there was any exclusive occupation parted with by the board to these persons. Now the board have originally had possession of the docks, and they had it generally for the purpose of managing the docks for the public who came to these docks, and the ships that came there; and they have various powers permitting them more or less to part with the control of different parts of the docks. In the first place, by the Act of 1858 (21 & 22 Vict. c. xcii.), s. 64, the board may, if they shall deem it expedient, but not otherwise—that is, they are enabled, but not bound—[The learned judge read s. 64.] Now, as to the words "appropriate for the exclusive accommodation and use," I do not know whether it was done purposely, but just such words

(1) 3 E. & E. 383; 30 L. J. (M.C.) 74.

are used as would be applicable to the case of an inmate of an inn, or a lodger, who has a room or lodgings set aside for his use and occupation; and the legislature avoid using words that would be appropriate and correct where a man was not only to have the rooms or other things appropriated for his accommodation and use, but was to have them in his exclusive occupation; in other words, have them demised to him. In the latter part of s. 82 there are certainly words used pointing much more to a demise. But even there, if they acted under that section, it might be doubtful, notwithstanding the word "let," whether it would give the exclusive occupation; because I see that by a subsequent section (84) it is provided that while they are let the servants who are employed, coopering, or repairing, or doing any other act whatever in connection with any goods for the time being deposited in such shed, &c., "shall be persons in the service, or approved of by the board." If a case should arise upon that, it may be for us to consider whether the reservation under the statute, that their servants shall be the people to do it, does not shew that the board, like the lodging-house keeper, were retaining the possession, even where there was a positive and absolute letting under that section. But in the present case there is nothing that seems to amount to a letting under that section at all; but they do seem to be exercising the powers in the earlier sections.

Now the letter is exactly the same in each case for this purpose. [The learned judge read the letter in paragraph 5 of the first case.] The word "occupation" is used, but we must look not at that word, but at the substance of the thing. What is there said is, that they set aside the quay space for the accommodation of the steamers of the particular owner; and when we look to the Act of Parliament we find that the board have certain powers, and amongst others the power of imposing a quay rent on goods that lie there, and a power of imposing a penal quay rent for goods that continue longer there; and this is an object of considerable importance to prevent the clogging up of the quays; and as it seems to me it is impossible to suppose, though Mr. Aspinall expressed some doubt, that the board could do that after they had parted with the occupation. It seems impossible that, if

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they had given an exclusive right to the possession of a space on the quay to other persons, that the board could, after that, demand rent for the use and occupation. The person who would be entitled to do it would be the tenant, the lessee to whom they had let that space, who might sue for use and occupation, or might bring an action of trespass against those who left the goods there. Yet, in point of fact, the board have taken the rents for this purpose in respect of the quays, &c., the subject of this rate. That seems to shew that the board have, de facto, remained in possession; and I can well understand it might be desirable and proper that the board, while granting these accommodation rights, nevertheless would retain the possession for the purpose of exercising their statutable powers for the protection of the public at large and of the ships and persons coming there.

It seems to me, therefore, when we come to look at the letter, and consider what they have done, and consider the object of it, that we should not construe this as anything more than an intention to let the shed and the quay space in this sense, "on your paying us a certain sum these shall be appropriated for your exclusive accommodation, but we still occupy them in order that we may, by means of our servants, exercise our statutable powers and have control and management of these things. We have those powers, and still retain the occupation for that purpose, though we give you the exclusive use and accommodation." If that be the case it would at once shew that the party rateable is the board and not the appellants.

There are two things that have been urged against that. In the first place, Mr. Aspinall endeavoured to argue that, inasmuch as the rent was made to depend on the number of square yards in the shed, though the letter said they had appropriated the quay space for the accommodation of these persons, yet it was to be considered there was a distinction made between the quay space and the sheds. I cannot think that. I think it is analogous to the instance of letting a farm of 100 acres at a rent of so much per ploughable acre, as to which there could be no doubt that the tenant would be the tenant of the farm roads, the barns, the stables, and the farm-house itself, and the stack yard and all these things, although his rent would be measured only by the

number of ploughable acres. There seems no difference here. The whole of the quay space is equally devoted to the appellants' accommodation, and equally retained by the board for their own purpose. Against that a point was urged with respect to the transit sheds,—which in one case includes all the sheds which are sometimes used as transit sheds, in the other only a portion,—that when there are goods liable to Customs' duty there, the Custom House officer has the key of one of the locks and locks them up at night. It appears that the key of the other lock is given to the appellants in each case respectively, they being the owners of the ships from which the goods have been landed, and which transit shed, by the terms of the statute, while the goods are there, is to be considered as an extension of the ship, so that the goods are to be considered on board the ship. That is done for the sake of convenience. It is argued that the effect of that is that during the night the exclusive occupation is given to the appellants. I do not think it amounts to that. If the appellants had kept the entire control day and night it would have made a considerably stronger argument in favour of the respondents, but it is only during the night that it is so locked up; and it strikes me it goes no further than the familiar instance of a lodger, who may very well have the key of the door of his bed room to lock up while he is not there, or he may lock up a cupboard of which he exclusively retains the key, and in which cupboard his goods are kept. In neither case do I think that that would at all shew that he had the occupation in the sense necessary to make him rateable.

There remains in Allan's case the question as to the four rooms. I think the store shed must be considered to go with the rest. If the case were being re-stated after our opinion has been given, it is not at all improbable that the four rooms occupied as offices and the store shed would turn out to be really occupied on similar terms to those on which the quay space was occupied; as to that the argument has been that, inasmuch as one was to be used by the appellants for their accommodation, the other would also be used for their accommodation only. But the case is so stated with regard to these that we cannot do that. It is said, in express terms, at the end of paragraph 6, that there is "a lock-up office, con-

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sisting of four rooms, in the exclusive occupation of the appellants and their employés for the transaction of shipping business."

In Inman's case there remains the distinction taken as to the coal depôt (paragraph 10). At first I rather thought that there was a distinction there; but I think, when one looks at it, that is not so, and that the space appropriated as the coal depôt still remains in the occupation of the board, who have not parted with the right to the possession, but simply licensed the storage of coals on it. That originally began in 1856, and that was before the Acts at present in force, and therefore the sections of these Acts could not govern it. The thing as originally done was this:—[The learned judge read the resolution of the 15th of October, 1856.] That was the original agreement in 1856, under which Mr. Inman entered, and it seems to me that the construction of that would be, not that he was to have the occupation, that they did not demise to him these 400 square yards of ground at all, but simply that they agreed that he should use it for the purpose of storing the coals on it on sufferance only, the condition being that when it was to cease they were to give him a week to clear away the coal. Still it is on sufferance only. That does not seem to me to be an occupation of the place by the appellant any more than in the case where a warehouseman agrees (as is often the case) with a corn merchant that he will appropriate a particular portion of his warehouse to receive the other's corn, that is on sufferance only, and he may retract the licence when he pleases; but it may be and very often is carried on for years; the merchant continues putting things there, but still the warehouseman remains in occupation and he is the person who is in possession and would be rateable for the warehouse. It does happen, in fact, that, though this commenced in 1856, eighteen years have now elapsed and still this space is in the occupation of the appellant, and consequently that which was on sufferance only has turned out to be very permanent. But we must look at the question not according to what the fact has turned out, but according to what were the rights of the parties; and it does seem to me that under the original agreement there was but a licence to have the coal stored there, and the space would be so far appropriated for his exclusive accommodation, but not his exclusive possession, so as to give him a demise. Afterwards, in 1869, it appears there

was a report read from the traffic manager in which he certainly uses words which look as if he thought Mr. Inman was lessee; he talks of the land "rented" of the board; and the engineer also talks of land occupied for the storage of coal, suggesting that the "rent" should be charged from the 1st of October, 1868. There was also a letter from Mr. Inman "agreeing to pay *rent* on the said area from the date in question which was read and approved, the rate of *rent*, and terms and conditions of *tenancy* being the same as heretofore." Now although they call it tenancy, yet this must refer expressly back to the letter of 1856, and, as it seems to me, the terms and conditions upon which it was to be held shew that, both as to the coal depôt and the offices and the sheds which accompanied it, the appellant was to hold them on sufferance. As long as the board pleased, the space was to be used for the accommodation of his coal, but this was to be without giving him the possession, so as to be rateable. As to the store-shed attached to the coal depôt, and now occupied as an office and shed for stores, there is nothing found there about the exclusive occupation, the two must go together, the terms being that the one is exclusively appropriated for him to store his coal upon and the other to put his stores in, but both are to be on sufferance. In neither is the occupation found to be exclusive, as in the case of the offices in Allan's case.

It comes round, theoretically at least, to precisely the same result ultimately. The Mersey Board, for what they let, will be rated at so much less, the appellants being rateable according to the value of the premises parted with. If the appellants are not rateable, the Mersey Board should be rated at so much more, because what they have received enhances the value of their occupation, and they can, if they like, alter the letting rent at which the others will be willing to take, while they pay the rates. The Mersey Board may now, if they please, and in theory should, and in time will, raise the rent so as to make the persons not gain by this. I am quite aware that in theory it will come to the same thing, but in practice, when people enjoy a thing at a penny per square yard, or half-a-crown, whatever it may be, it is not so easy to get it changed for some little time, although no doubt ultimately it will come round to what I have said. That, I think, disposes of both cases.

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QUAIN, J. I am of the same opinion upon the general ground, without going into the detail which my Brother Blackburn has already done so fully. The general ground upon which I decide the case is, that the arrangements under s. 64 do not confer that kind of occupation which is a rateable occupation within the meaning of the statute. The Mersey Board acted and intended to act in this particular case under s. 64, by which they may, if they choose, set apart and appropriate certain sheds or quay space for the preferential use of certain shipowners carrying on a constant and permanent trade at the port. It appears to me that that was what was intended, and that the right conferred by s. 64 does not take the occupation out of the Mersey Board and confer it on the appellants. The Mersey Board retain the control, possession, and occupation, merely granting certain rights under s. 64 by way, as it is called, of setting apart and appropriating for the exclusive accommodation of these people either the quay space or sheds as the case may be. It appears to me that it is not a letting or a demise, nor was it intended to confer an exclusive occupation on the appellants, and that the rights which they gain under such arrangements do not constitute an occupation within the meaning of the Poor Law Act.

ARCHIBALD, J. I am entirely of the same opinion. I think, except as to the four rooms occupied as offices, the effect and drift of the arrangement is merely to give accommodation, and not such an exclusive occupation as would render the occupants liable to be rated. I need not go in detail into the question again, because I entirely concur in the conclusion at which my Brothers Blackburn and Quain have arrived.

PER CURIAM. In Inman's case the appellant having succeeded entirely, there will be judgment for him with costs; in the other, each party having partially succeeded, there will be judgment accordingly, with no costs.

Judgments accordingly.

Attorney for Allan: *J. B. Batten.*

Attorney for Inman: *T. W. Goldring.*

Attorneys for respondents: *Gregory, Rowcliffes, & Co., for Duncan, Hill, & Co., Liverpool.*

SKINNER, APPELLANT; VISGER, RESPONDENT. 1873*

Turnpike—Exemption from Toll—Locomotive Steam Engine going to Plough— *Nov.* 19.
3 Geo. 4, c. 126, s. 32—24 & 25 Vict. c. 70, ss. 1, 10, 12.

By 24 & 25 Vict. c. 70, s. 1, tolls are imposed on "every locomotive propelled by any power containing within itself the machinery for its own propulsion;" by s. 10 all carriages drawn by any locomotive are entitled to the same exemption as they would be if drawn by animal power; and by s. 12 all provisions of any general or local Acts relating to turnpike roads are to apply to all locomotives propelled by other than animal power, and to carriages drawn by such locomotive. By s. 32 of the General Turnpike Act, 3 Geo. 4, c. 126, no toll shall be demanded . . . for any horse, or beast, or carriage employed in carrying or conveying . . . any ploughs, harrows, or implements of husbandry, or for any horses or other beasts employed in husbandry, going to or returning from plough or harrow, not travelling more than two miles on the turnpike road.

A locomotive engine, propelled by its own steam power, having on it gear necessary for working a plough, passed through a turnpike gate on its way to a place more than three miles from the gate, to drive a plough which, from its construction, could not be used without a steam engine and gear :—

Held, that the steam engine was not within any of the above exemptions from toll.

CASE stated under 20 & 21 Vict. c. 43, by justices of Wilts.

An information was preferred by the appellant against the respondent, for that he, on, &c., being then the driver or person in charge of a certain locomotive, then being driven on the Swindon and Hungerford turnpike road, at the parish of Swindon, in the said county, and which said locomotive was propelled by power containing within itself the machinery for its own propulsion, did then and there, with such locomotive, pass through Swindon turnpike gate, without paying, when demanded, the toll due from him in respect of such locomotive.

Upon the hearing it was proved that the appellant was the toll gate keeper at the toll gate mentioned in the information, and that the respondent was a person who let out for hire steam ploughs and scarifiers, and had to move them from place to place by a locomotive engine propelled by its own steam power.

On the day in question the respondent was taking the engine, which had on it gear necessary for working the plough, through

* Decided in Michaelmas Term.

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the turnpike gate at Swindon, to his place of business, a distance of three miles from the turnpike gate; and from his place of business the engine would proceed some further distance to drive a plough on a farm not occupied by the defendant; such plough could not, from its peculiar construction, be used without a steam engine with the necessary gear, and such ploughing was to be done for hire and profit.

The respondent claimed to be exempt from payment of toll (there being no dispute as to the amount of the toll demanded), on the ground that the engine, with its gear, as being part of the plough (which it was on its way to take up) was used solely for agricultural purposes, and was exempt from toll under the General Turnpike Act, 3 Geo. 4, c. 126, s. 32 (1), or by the local Act 1 Geo. 4, c. lxxii., which contains the following clause, s. 9: None of the tolls granted by this Act shall be demanded or taken (inter alia) "for or in respect of any carriage, horse, cattle, or beast employed only in carrying or conveying, or going empty or unladen to carry or convey, or returning empty or unladen from carrying or conveying, having been employed only in carrying or conveying any ploughs, harrows, or implements of husbandry, not sold or disposed of, or passing for that purpose."

The appellant contended that, under 24 & 25 Vict. c. 70, s. 1, "every locomotive propelled by any power, containing within itself the machinery for its own propulsion," was liable to pay toll, without any exception, no matter what it might be drawing; and that though, by s. 10 of the same Act it was provided that, "All waggons, wains, carts, or carriages, as hereinbefore described, drawn by any locomotive, and loaded with any materials such as are now exempt from toll under the provisions of any general or local Act,

(1) By 3 Geo. 4, c. 126, s. 32: "No toll shall be demanded or taken by virtue of this or any other Act on any turnpike road . . . for any horse, beast, or other cattle or carriage employed in carrying or conveying (having been employed only in carrying or conveying) on the same day any dung . . . or any ploughs, harrows, or implements of husbandry, . . . or for any horses or other beasts employed in husbandry, going to or returning from plough or harrow, or to or from pasture or watering place, or going to or returning from being shod or farried, such horses or other beasts not going or returning on those occasions more than two miles on the turnpike road on which the exemption shall be claimed."

shall be entitled to the same exemption as they would be if drawn by animal power" (1), yet that the locomotive engine itself was expressly made liable by the Act to toll, and was liable per se to toll, as it not only contained within itself the machinery for its own propulsion, but was at the time of passing through the gate being actually propelled by such power; and moreover that, as the respondent admitted that such engine and plough were intended to be let out for hire and profit to a third person, and not used or employed by him for the cultivation of his own land, it was doubtful whether even a plough drawn by such engine would have been exempt from toll under 3 Geo. 4, c. 126, s. 32; but at any rate the engine itself was liable to toll under 24 & 25 Vict. c. 70, s. 1.

The justices dismissed the information.

The question for the Court was, whether the steam engine was exempt from payment of the toll by reason of anything contained in the General Turnpike Act, 3 Geo. 4, c. 126, or 24 & 25 Vict. c. 70, or any other statute regulating tolls payable at a turnpike gate by such locomotive engine.

T. S. Pritchard, for the appellant. The justices dismissed the complaint generally. As a toll is imposed by 24 & 25 Vict. c. 70, s. 1 upon "every locomotive propelled by any power containing within itself the machinery for its own propulsion," this engine was primâ facie liable to toll. Sect. 12 applies all the provisions of former Acts, whether general or local, relating to turnpike roads, to carriages drawn by locomotives; and by s. 10, all carriages drawn by any locomotive hitherto exempt by any Act are still to be exempt: but this does not apply to a locomotive itself. Then did this particular locomotive, on the occasion in question, come within any of the exemptions in s. 32 of the General Turnpike Act, 3 Geo. 4, c. 126? That section enacts that "no toll shall be demanded or taken . . . for any horse, beast, or other cattle or

(1) By s. 12 of the same Act (24 & 25 Vict. c. 70): "All the clauses and provisions of any general or local Acts relating to turnpike roads or highways shall, so far as the same are not expressly altered or repealed by or are not inconsistent with this Act, apply to all locomotives propelled by other than animal power, and to all waggons, wains, carts, and carriages of any other description drawn by such locomotive, and to the owners, drivers, and attendants thereof, in like manner as if drawn by animal power:" . . .

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carriage employed in carrying or conveying . . . any plough, harrows, or instruments of husbandry," (the local Act containing an exemption in similar terms) . . . "or for any horses or other beasts employed in husbandry going to or returning from plough or harrow, . . . such horses or other beasts not going or returning on those occasions more than two miles on the turnpike road on which the exemption shall be claimed." This locomotive was not carrying the plough, but only gear, and so was not within the first of the above exemptions in the general and local Act: nor can it be said to be a beast employed in husbandry going to plough; but even if it could, it was going or returning more than two miles along the turnpike road.

The respondent did not appear.

BLACKBURN, J. I have come to the conclusion that the magistrates were wrong in dismissing the complaint. The exemption in s. 32 of the general Act, which is not contained in the local Act, of beasts going to or returning from plough, is confined to beasts not travelling more than two miles along the turnpike road; so that, assuming a locomotive can come within this exemption, on the present occasion it was not within the exemption; then as to the other exemption, which is in both the general and local Act, this locomotive was not carrying a plough or an instrument of husbandry, but was only going to the plough. It was carrying gear to be attached to the plough, but it was not part of the plough. The case must be remitted to the magistrates with this intimation of our opinion.

LUSH and QUAIN, JJ., concurred.

Case remitted accordingly. (1)

Attorney for appellant: *W. Moon, for Townshend & Ormond, Swindon.*

(1) See *Reg.* v. *Malty*, 8 E. & B. 712; 27 L. J. (M.C.) 59.

THE QUEEN *v.* THE OVERSEERS OF HASLINGFIELD. 1874

Jan. 17.

Overseers' Accounts, Disallowance of Items in—Fees to Justices' Clerks for Costs of Jury Lists—The County Juries Act, 1825 (6 *Geo.* 4, *c.* 50)—*Expenses of Jury Lists to be paid out of the Poor-rates*—7 & 8 *Vict. c.* 101, *s.* 60—*Fees to be taken by Clerks to Justices*—11 & 12 *Vict. c.* 43, *s.* 30.

The Quarter Sessions, under s. 30 of 11 & 12 Vict. c. 43, duly made a table of fees to be taken by the clerks to the justices within the county of C., and (amongst others) a fee of 2*s.* 6*d.* for notice to parish officers to return and verify jury lists, and 2*s.* for allowance of list, and stated that these fees were payable by the overseers. These fees were sanctioned by the secretary of state. The overseers of the parish of H. paid such fees to the clerk to the justices of the petty sessional division in which H. was situate, and claimed before the poor law auditor to have them allowed to them out of the poor-rates, under s. 60 of 7 & 8 Vict. c. 101. The poor law auditor disallowed the payment:—

Held, that the overseers had no authority for making the payment to the justices' clerk, and the poor law auditor had rightly disallowed the payment.

Rule to shew cause why a certain item of disallowance of 4*s.* 6*d.* made by the poor law auditor of the Cambridgeshire and Huntingdonshire poor law audit district, in the accounts of the overseers of the parish of Haslingfield, should not be quashed.

It appeared from the affidavits, that on the 6th of December, 1872, the overseers of the parish of Haslingfield appeared before the poor law auditor of the Cambridgeshire and Huntingdonshire poor law audit district, and presented to him their accounts for the half year ending at Michaelmas, 1872: that the auditor duly audited the accounts, and that in the receipt and payment book of the overseers appeared an entry as follows: "August 31, costs of jury lists 8*s.* 6*d.*" The poor law auditor disallowed the payment of 4*s.* 6*d.*, being part of the 8*s.* 6*d.* charged in the accounts. The 4*s.* 6*d.* had been paid by the overseers to the clerk of the justices of the petty sessional division, and claimed by him on production of the jury list for revision at the petty sessions for that division, under the Counties Juries Act, 1825. The item was disallowed on the following grounds: first, that the overseers had no statutory authority for making the payment to the justices' clerk; secondly, that the sum of 4*s.* 6*d.* did not consist of costs, charges, and expenses properly incurred by the officers of the parish in making out, preparing, printing, and collecting the lists

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of persons qualified to serve on juries within the meaning of 7 & 8 Vict. c. 101, s. 60; thirdly, that the table of fees payable to the justices' clerk cannot impose any liability to pay them; fourthly, that the justices' clerk was not set in motion by the overseers, and was bound to perform the duty gratuitously.

A table of fees to be taken by justices' clerks in the county of Cambridge had been made by the justices in quarter sessions, on the 29th of June, 1854, and certified by the Home Secretary under 11 & 12 Vict. c. 43, s. 30, and amongst the fees to be taken, were the following:—

	Fees. s.	d.	By whom payable.
JURORS.—Notice to high constables and parish officers to return and verify jury lists, with notices to justices, each parish	2	6	By overseers.
For allowance of list and return thereof, and oath, each parish	2	0	

Lumley Smith shewed cause. These fees charged in the account as having been paid by the overseers were properly disallowed. The overseers have no authority for the payment of the fees, and they cannot therefore be allowed out of the poor-rates. By the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 4, the clerk of the peace in every county is to issue his warrant to the high constable, commanding him to issue his precept to the overseers, requiring them to prepare and make, before the 30th of September, a list of men to serve on juries; s. 5 provides the manner in which the precept shall be issued, and the schedules of the Act contain the forms of both warrant and precept By the Juries Act, 1862 (25 & 26 Vict. c. 107), s. 3, the functions of the high constable are repealed, and by s. 4, the clerk of the peace is to issue the precept to the overseers. By s. 8 of 6 Geo. 4, c. 50, the overseers on receipt of the precept are to prepare and make out the list of jurors; by s. 10 a special petty sessions is to be held within the last seven days of September, of which notice is to be given by their clerk to the overseers of every parish, who shall "then and there produce the list of the men liable to serve on juries by them prepared and made out, and shall answer upon oath such questions touching the same as shall be put to them by the justices," and the justices shall, from information or upon their own knowledge, reform all errors in the lists, and by s. 9 of 25 &

26 Vict. c. 107, after the lists shall have been allowed and signed by the justices, the clerk to the justices shall forward the same to the clerk of the peace for the county. Under these sections it is the duty of the overseers "to prepare and make the lists," to attend at the petty sessions, and hand them in to the clerk to the justices, but there is nothing in any of these sections to shew that the clerk is to receive any fee for verifying the jury lists, or for the allowance of the lists. If there is no authority for the clerk to receive the fee, neither is there any authority to the overseers to pay it out of the poor-rates. By s. 60 of 7 & 8 Vict. c. 101, "the costs, charges, and expenses properly incurred by the officers of the parish in making out, preparing, printing, and collecting the lists of persons qualified to serve on juries, shall be paid and allowed to them out of the rates of the parish." This fee is not a cost, charge, or expense incurred by the overseers in the discharge of their duty as overseers, neither is it incurred by them in making out, preparing, printing, and collecting the jury list; it is a payment made to the justices' clerk after the list is complete, and cannot therefore be paid out of the poor-rate. The justices in quarter sessions have power under s. 30 of 11 & 12 Vict. c. 43, to make tables of fees which, in their opinion, should be paid to (amongst others) clerks of the justices, and they have made a table of fees to be paid for revising the jury list, and stating by whom the fees shall be paid, which has received the sanction of the Secretary of State; but the object of the enactment is only to enable justices to regulate the amount of fees to be received by clerks, it confers no power to create new fees or to direct by whom they shall be paid. In *Reg.* v. *Stewart* (1), Lord Denman, C.J., in treating of what payments can be made out of the poor-rates, says: "The overseer is a statutable officer, dealing with a statutable fund, and accountable for its application to statutable purposes . . . the relief and employment of the poor are its objects; the fund is created for them, and cannot be diverted from them unless to objects specifically engrafted on them by subsequent statutes." Unless, therefore, it can be shewn that there is some statute which requires that these fees should be paid out of the poor-rates, this sum of 4*s.* 6*d.* has been properly disallowed.

(1) 12 A. & E. at p. 777.

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Field, Q.C., and *Sills*, in support of the rule. The clerk to the justices is entitled to the fee; it ought to be paid by the overseers and allowed to them out of the poor-rate. By s. 10 of 6 Geo. 4, c. 50, the justices in petty sessions are in effect to revise the jury lists. The overseers are to attend at the sitting of the court with the lists; it is the duty of the clerk to give notice to the overseers of the holding of the session, and to receive the lists from them, to assist at verifying the lists, and to administer the oath, if required, at the examination of the overseers; for the performance of all these duties the clerk is entitled to be paid; he is set in motion by the overseers; it is for their benefit that the lists should be completed, and the clerk is entitled to fees for services rendered; the overseers, however, are not to pay those expenses out of their own money, but are entitled to charge them to the poor-rate according to the principle laid down in *Veley* v. *Pertwee* (1), by Cockburn, C.J., that "according to common right a man who is bound to perform the duties of an office, and is liable to the expenses incidental to that office, is not bound to pay out of his own pocket the fees of officers for the performance of duties not connected with that office." The table of fees the justices are empowered to make under 11 & 12 Vict. c. 43, s. 30, are fees to be taken for business transacted or done by the clerk to the justices; the justices had authority to direct for what business the fee is to be charged, and by whom it is to be paid, and it is a rule of law that whoever wants the thing in respect of which the fee is made payable, must pay the fee: *Wray* v. *Chapman*. (2) The overseers were rightly directed to pay the fee, and it ought to be allowed to them out of the poor-rate, under s. 60 of 7 & 8 Vict. c. 101.

BLACKBURN, J. In this case the justices, under s. 30 of 11 & 12 Vict. c. 43, so far ago as the year 1854, made a table of fees to be taken by the clerks to the justices in the county of Cambridge, in which (among other fees), a fee of 2*s.* 6*d.* is allowed to be received for notice to high constables and parish officers to return and verify jury lists, and 2*s.* for allowance of list and return thereof and oath; and it is stated that these fees are payable by the overseers of each parish. This table of fees has been sanctioned by

(1) Law Rep. 5 Q. B. at p. 579. (2) 14 Q. B. 742, 758.

the Secretary of State. The overseers of the parish in question paid these fees, amounting to 4*s.* 6*d.*, to the clerk of the justices, and charged this sum in their accounts as an expense incurred by them under s. 60 of 7 & 8 Vict. c. 101. The poor law auditor, however, disallowed the sum, and I think it was properly disallowed. It was said, on behalf of the overseers, that when the justices' clerk has, by statute or otherwise, to do certain work, he is entitled to remuneration as for services rendered, and that he is to be paid for his work by those at whose request the work was done; and the only effect of s. 30 of 11 & 12 Vict. c. 43, is that the clerk cannot take any fee for the work unless it has been first allowed by the justices under that Act as a reasonable and proper fee. I do not know how that may be, but assuming that this argument is correct, the payment of the fee would be by the person at whose request the work was done, and when we look at the several sections of 6 Geo. 4, c. 50, it is clear that the work to be done by the justices' clerk, for which the fee amounting to 4*s.* 6*d.* is allowed to be taken, is not in any sense work done at the request of the overseers. The scheme of the County Juries Act (6 Geo. 4, c. 50), is that the high constable is to send a precept to the overseers of every parish commanding them to make out a list of the jurors; the overseers are to make out that list, and they are to produce it before the justices at petty sessions; the justices at petty sessions have previously, by their clerk, to give notice to the overseers of the holding of their sessions, and at these sessions the justices of their own motion are to make objections if they think fit, and also to hear objections made to the lists, and then they are to amend the lists, which are to be handed to the high constable who is in attendance for the purpose, and by whom they were transmitted to the clerk of the peace to make up the jury book; the duty of transmitting them is now discharged by the clerk to the justices under s. 9 of 25 & 26 Vict. c. 107. All this is to be done by the justices, and not at the request of the overseers. Supposing, therefore, it is established and made clear that the charge of 4*s.* 6*d.* might be recoverable from the person at whose request the work was done, it is enough to say it is not shewn that the overseers requested that the work should be done, and therefore they are not the persons to pay for it.

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If the overseers had been compellable as being the persons at whose request the work was done to pay for it, it is said they must pay for it out of their own pockets, and could not deduct it from the poor rate. My impression is very strong, whatever the overseers in performing their duty were obliged to pay, they are entitled to have allowed to them from the poor rate under s. 60 of 7 & 8 Vict. c. 101; but inasmuch as we hold that it was no part of the overseers' duty to have the lists altered and amended at the petty sessions, and that these were things not done at their request, it follows that they are not expenses incurred by the overseers under s. 60 of 7 & 8 Vict. c. 101; so that when we decide that the overseers did not request that the work should be done, we, in effect, decide that the payment could not be charged to the poor-rate; it is a payment made in their own wrong; they were not bound to pay the justices' clerk at all, and consequently the disallowance is good.

QUAIN, J. I am of the same opinion. I think the clerk to the justices is not entitled to be paid the fees he claims from the overseers, and therefore the disallowance by the auditor is right. The 6 Geo. 4, c. 50, is to be read with 25 & 26 Vict. c. 107. It is plain, under both Acts, the overseers have completely done their duty when, in pursuance of the notice sent by the justices under s. 10 of 6 Geo. 4, c. 50, they attend at the petty sessions with the lists which they have prepared and printed, and remain there to answer upon oath any question the justices may put. I think the extent and limit of their duties is confined to that. As soon as they have handed in their lists at the sessions, and expressed their readiness by their presence to take an oath and answer any question the justices may put to them, it seems to me their functions and duties are at an end. Sect. 10 has fixed the time for the sessions to be held for this purpose within the last seven days of September, and that imposes upon the clerk to the justices the duty of summoning the overseers by giving them a notice under the early part of that section; then, as soon as they appear at sessions and hand in the lists, the lists are in the custody of the justices, and under 25 & 26 Vict. c. 107, as soon as they are allowed, then the justices hand them over to their clerk; and the

later Act of Parliament imposes a duty upon the clerk to the justices personally to send the lists by the next available post to the clerk of the peace for the county, by whom the jury book is prepared under s. 12 of that Act. What is done by the clerk to the justices is done in pursuance of the duties imposed on him by the Act of Parliament, and it is not labour or work done at the request of the overseers. Therefore, if it be the law,—I do not, as at present advised, think it necessary to give any opinion on the point,—but if it be the law that when work is imposed upon the clerk to the justices the persons that put him in motion are liable to pay him, I do not think the clerk can be said to be put in motion by the overseers or to be acting at their request. I am also of opinion that these fees are not within s. 60 of 7 & 8 Vict. c. 101. I do not think they are expenses or costs incurred in "making out or preparing" the lists. The same words are used in ss. 6, 8, and 9 of 6 Geo. 4, c. 50, and therefore we gather from these three sections what is the work intended to be designated by the expression preparing and making; it is work done by the overseers before they attend at the petty sessions where the lists are allowed. What the expression "collecting" in s. 60 refers to I confess I am at a loss to understand. It would seem probable it was a mistake, and that it should have been "correcting;" but we have referred to the Parliament roll of the statute, and there the word is "collecting." I am of opinion that this is not work done at the overseers' request, and even if it was work done at the overseers' request, it is not within s. 60 of 7 & 8 Vict. c. 101, and therefore the overseers have not any right to any allowance out of the poor-rate. The consequence is, the overseers paid the fees in their own wrong, and the auditor is right in disallowing the item as a charge against the poor-rate.

Rule discharged.

Attorneys for the prosecution: *Sharpe, Parkers, & Co.*
Attorney for defendants: *Harris.*

1874
Jan. 27.

PEIRCE *v.* CORF.

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17—*Sale by Auction—Memorandum in Writing—Entry in Sales Book by Auctioneer's Clerk.*

The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on the 28th of March, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as lot 49. The defendant had a sales ledger, which was headed "Sales by auction, 28 March, 1872," in which the plaintiff's mare was also numbered 49; but neither the catalogue nor the conditions of sale were annexed to the sales ledger, nor were they referred to therein. On the 28th of March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale and knocked down to M. for 33*l.*, and thereupon the defendant's clerk wrote in the columns of the sales ledger left blank for this purpose the name of M. as purchaser and the price. M. afterwards refused to take the mare:—

Held, that the catalogue and the conditions of sale were not sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M. to satisfy s. 17 of the Statute of Frauds.

Semble, that the entry by the clerk was not by an authorized agent so as to bind the purchaser.

Appeal from the County Court of Lancashire holden at Liverpool.

The action was brought to recover the sum of 30*l.* for damage sustained by the plaintiff through the negligence of the defendant, as an auctioneer, in not making a binding contract with Thomas Maguire, to whom a mare of the plaintiff's had been knocked down at a sale by auction at the defendant's repository, where the mare had been sent by the plaintiff to be sold.

At the trial the judge directed a verdict to be entered for the plaintiff, on the following facts:—

In March, 1872, the plaintiff, being the owner of a mare, placed her in the hands of the defendant (who is an auctioneer and proprietor of a horse repository, where, under the name of Lucas & Co., he holds periodical sales of horses by auction) with directions to offer her for sale at one of his public sales.

Accordingly the defendant advertised the mare with a number of other horses for sale by auction on the 28th of March, 1872,

and circulated a printed catalogue of the horses and things intended to be sold at this sale.

In the catalogue the plaintiff's mare was numbered 49.

Upon the catalogue were printed the conditions of sale; the catalogue and the conditions forming one document.

The catalogue was headed, "To be sold by auction by Messrs. Lucas & Co., on Thursday, 28 March, 1872, at 12 o'clock, at their repository, Liverpool, 50 valuable horses." Then followed the conditions of sale, and afterwards an enumeration of the lots to be sold. The description of the plaintiff's mare was inserted thus:— "Lot 49: Gray mare, 6 years old, 15–3 hands high, steady to ride and drive."

Prior to the sale the defendant (according to his practice) caused to be made in such of the columns in his "sales ledger," as were applicable to matters ascertainable before the sale, entries relating to the horses described in the catalogue. In this ledger the horses are entered in the same order, and were numbered as in the catalogue.

On the 28th of March, 1872, the lots described in the catalogue were put up for sale under the conditions by the defendant as auctioneer.

Neither the catalogue nor the conditions of sale were annexed or affixed to the "sales ledger," nor are they referred to therein; but the defendant during the sale held in his hand a catalogue with the conditions of sale.

The plaintiff's mare was, in her turn, according to numerical order in the catalogue, put up for sale, and knocked down to Thomas Maguire for thirty-three guineas.

Thereupon the defendant's clerk wrote in the columns of the "sales ledger" left blank for the purpose opposite to the lot in question the name of the purchaser and the price.

The "sales ledger" was headed: "Select sales by auction, Thursday, 28 March, 1872." And the entry as to the plaintiff's mare was as follows:

"Owner: Peirce. Lot 49: Gray mare, age 6. Warranty as to soundness: ———. Warranty as to harness: 'Ride and drive.' Reserve: C.E. Purchaser: T. Maguire. 33*l.* Amount: ———.

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Paid or entered: Commission: 1*l.* 19*s.* 6*d.* Livery: 10*s.* 6*d.* Total charge: 2*l.* 10*s.* 0*d.* Memo. returned.

The defendant did not ask for or obtain any deposit from Thomas Maguire, nor was anything given by the latter person in part payment.

As soon as the sale was over, Thomas Maguire requested the defendant to put the mare into harness, in order that he might before taking delivery test whether she was steady in harness. This was accordingly done, and Thomas Maguire, not being satisfied with the mare's steadiness, declined to take her, and thereupon wrote and handed to the defendant the following letter:—"Liverpool, 28 March, 1872. Gentlemen,—I return the gray mare, Lot 49, bought at your sale this day, as not being steady in harness as warranted. Thomas Maguire."

Thomas Maguire refusing to take delivery of and pay for the mare, she was, after notice given to him, resold on the 16th of May, 1872, for the sum of 29*l.* 8*s.* The plaintiff thereupon brought an action in the county court at Liverpool against Thomas Maguire, for the recovery of damages in respect of the loss sustained by the plaintiff by reason of Maguire's refusal to take the mare. This action was tried before the judge on the 23rd of October, neither the "sales ledger," nor Maguire's letter being put in evidence; at the conclusion of the case of the plaintiff, the then defendant's counsel contended that no signed note or memorandum in writing of the bargain sufficient to satisfy the requirements of the 17th section of the Statute of Frauds had been proved. The judge nonsuited the plaintiff.

The plaintiff then commenced the present action against the present defendant. At the hearing the defendant put in evidence the catalogue and the conditions of sale, the sales ledger, and Maguire's letter. The defendant also proved by his own parol evidence that the entries, No. 49 of the catalogue and in the sales ledger related to the same animal, that is to say, to the mare of the plaintiff, and to the sale on the 28th of March.

It was contended on behalf of the defendant that there was evidence of a signed note in writing of the bargain, that is to say of the sale of the mare to Maguire on the 28th of March,

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sufficient to satisfy the requirements of the 17th section of the Statute of Frauds. The judge was of opinion that there was no proof of a sufficient connection, by reference or otherwise, between the conditions of sale and the entries in the sales ledger; and gave judgment for the plaintiff.

The question for the opinion of the Court was, whether under the circumstances there was evidence of a signed note or memorandum in writing of the bargain, sufficient to satisfy the 17th section of the Statute of Frauds.

Herschell, Q.C. (*Gully* with him), for the defendant. There is a sufficient memorandum in writing of the bargain signed by the parties, to constitute a contract within the 17th section of the Statute of Frauds (29 Car. 2, c. 3). Several documents, if connected, will constitute a good memorandum. Taking the two documents, the catalogue and the sales ledger, the inference is that they relate to each other. If from the documents there is a sufficient identification it is sufficient: *Allen* v. *Bennet* (1); *Dobell* v. *Hutchinson*. (2) The catalogue is dated Thursday, the 28th of March. The description is, "Lot 49, gray mare, six years old, steady to ride and drive." The sales ledger corresponds in every particular with those items. There can be no doubt it is the same sale. "Lot" is a well-known term, and is understood to mean things which are sold at auction. There is a reference in the two documents to each other; and therefore the defendant is entitled to shew by parol evidence that lot 49 in the catalogue must mean lot 49 in the ledger. There being therefore a sufficient incorporation of the catalogue and conditions of sale with the sales ledger, the two documents contain all the requisites of a good memorandum. The plaintiff will rely on *Hinde* v. *Whitehouse* (3); and no doubt it was there decided that, where the conditions of sale are not annexed to the catalogue, signing the buyer's name in the catalogue is not a sufficient memorandum. That case however is distinguishable, for there nothing in the document containing the conditions of sale shewed it related to the catalogue. The conditions were a separate and distinct document from the catalogue, and no inference could be drawn that the two documents related to the

(1) 3 Taunt. 169. (2) 3 A. & E. 355. (3) 7 East, 558.

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same sale. But where one document refers to the other, as in this case, evidence is admissible to shew that the contract is identical: *Buxton* v. *Rust.* (1) There is another point. The letter of Maguire refers to the catalogue, so as to constitute a contract by Maguire to purchase the mare.

[BLACKBURN, J. The letter and the catalogue would not make a contract, for they do not state the price at which the mare was sold.]

Wheeler, for the plaintiff, was not called upon.

BLACKBURN, J. I am of opinion that the decision of the county court judge should be affirmed. The defendant, who is an auctioneer, having undertaken to sell the mare at a price exceeding the sum of 10*l.*, was bound, as part of his duty, to take reasonable and proper care that the contract of sale was binding. The mode in which contracts are made by an auctioneer,—and which must now be considered as recognized at law,—is, that when an auctioneer is selling he has a catalogue to which are annexed the conditions of sale, and he has authority from the highest bidder to sign the catalogue on his behalf, and if the auctioneer signs the catalogue with the conditions, that is a sufficient memorandum in writing of a contract within the Statute of Frauds to bind the purchaser. But in order to make a valid contract, the document the auctioneer signs on behalf of the buyer must contain all the terms of the contract; the contract being, in fact, subject to the conditions contained in the catalogue, and the purchase being at the price noted at the time. The memorandum, to be a good memorandum, must be signed in such a manner that when the auctioneer attaches his signature it authenticates the contract as to the price and conditions of sale. I have already said that the usage of sales by auction which we must take notice of is, that the auctioneer is the person who has authority to sign, and generally he does wisely if he signs upon the catalogue. I am not prepared to say, if the auctioneer had a ledger or book in which the conditions were copied out, and he signed that ledger, that that, without other evidence, might be said to be a sufficient contract, although he had not signed the catalogue; but I take it as quite clear that the

(1) Law Rep. 7 Ex. 1; in error, at p. 279.

auctioneer's clerk has no authority to sign by the general custom; although, as *Bird* v. *Boulter* (1) decided, there may be special circumstances to shew that an auctioneer's clerk had authority to sign; where the bidder, that is, the person to be charged, by word or sign authorizes the auctioneer's clerk to sign on his behalf, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent. The present case finds that the auctioneer's clerk signed a document called the sales ledger. There is nothing in the case that leads me to conclude that the ledger was intended to be shewn or was known to the bidders. The cyphers in it referring to a reserve bid is a matter that would be kept by the auctioneer probably from his own clerk, and would lead to the conclusion that it was not intended that the bidder should see the sales ledger. I should be inclined to think that the defendant's clerk, in signing that document, was signing it as an agent employed by his master, the auctioneer, and not by the bidder; that is what I should infer; but however that may be, this point does not appear to have been taken before the county court judge. What he decided was, assuming that the writing of Maguire's name in the sales ledger was a signature made by an agent with authority, that as there was not any reference in the sales ledger to the conditions of sale, there was no sufficient memorandum within the Statute of Frauds to constitute a binding contract with Maguire for the purchase of the mare. In *Hinde* v. *Whitehouse* (2), the auctioneer read the conditions, and then laid them on his desk; he held the catalogue in his hand and wrote down the name of the purchaser opposite the lots in the catalogue. Lord Ellenborough held that the contract, when made, was subject to the conditions; and as the contract that was signed did not incorporate the conditions, there was no memorandum of a bargain under the conditions. The catalogue and the conditions were not connected physically, nor had the catalogue any internal reference to the conditions to shew they were incorporated. In the present case it was argued by Mr. Herschell that, inasmuch as the sales ledger was dated on the same day as the catalogue and referred to certain "lots" which were identical with the lots in the catalogue, it must have referred to that par-

(1) 4 B. & Ad. 443. (2) 7 East, 558.

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ticular sale on that day of those particular lots, and that there was a sufficient connection between the sales ledger and the catalogue, so that the lots were necessarily sold subject to the conditions in the catalogue. I am not able to concur in that argument. I am not aware there is any custom known to the law, and I do not believe there is such a custom as to make it necessary that every sale by the auctioneer should be upon the terms of the catalogue; on the contrary, in many instances the terms of the catalogue are departed from, and there is often a verbal notice, although the particulars are so and so, yet this lot will be put up subject to such a condition, and that practice often gives rise to disputes as to whether the party purchasing heard of the alteration in the conditions; and I do not think there is any usage or universal custom from which it follows that every sale is taken to be subject to the conditions as stated in the catalogue; I therefore cannot think that there is sufficient reference in the one to the other.

There is another point. After the sale Maguire wrote a letter to the defendant, in which he says: "I herewith return the gray mare, lot 49, bought at your sale this day, as not being steady in harness as warranted." I think that letter amounts in effect to a statement by Maguire that he bought the mare at the defendant's sale, and I think parol evidence would be admissible to shew that he bought it subject to the conditions of the catalogue; and I am inclined to think, though it is not necessary to decide it, the letter is equivalent to Maguire saying: "I return the gray mare which I bought at your sale upon the conditions of the catalogue"; but such a writing would be a defective memorandum under the Statute of Frauds, because it does not state the price at which the mare was bought. But it may be said it sufficiently refers to the price written down by the clerk in the sales ledger. This point does not seem to have been raised before the county court judge; but if it had been, I should have been of opinion that, in order to make out that the letter refers to the price written down by the clerk, it is essential to shew that the clerk, when he was writing the price in the sales ledger, wrote it down in such a manner that the bidder was aware that he was writing it down as a memorandum for him.

I think that there is no sufficient memorandum in writing

within the Statute of Frauds, and our judgment must be for the plaintiff.

QUAIN, J. I am of the same opinion. The first question that Mr. Herschell raised is that the catalogue, which contained the conditions, and the sales ledger, which contained the price and the name of the purchaser, are sufficiently connected, so as to be considered as a memorandum in writing within the Statute of Frauds. I think they do not constitute a contract within the Statute of Frauds, because I cannot see on the face of them anything to connect the one with the other, so as to enable me to read them together. I take the principle to be well laid down in *Dobell* v. *Hutchinson* (1), where it is said by Lord Denman, C.J.: "Upon examination it will be found that the cases establish this principle, that where a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." Therefore on the document itself there must be some reference from the one to the other, leaving nothing to be supplied by parol evidence except the identity, as it were, of the document. Now there is in this case a catalogue which contains the number of the lot, 49, the description of the mare, and the conditions; and in the sales ledger, which contains no reference to the catalogue, there is "lot 49," with the description "A gray mare," and there is the name of the purchaser, "Maguire," and the price at which the mare was sold; but the ledger has no reference to the catalogue which contains the conditions of sale; and we cannot, by reading the two documents together, make out a written contract. The same point arises on the letter of Maguire. No doubt in that letter he says, "I bought lot 49 at your sale." If that letter contained any reference to the sales ledger, containing the price and the name of the purchaser,—though the name of the purchaser is not wanted because he admits by his letter that he is the purchaser,—that would be sufficient to constitute a good memorandum. But it is manifest, when Maguire uses the expression "lot 49" in the letter, he is referring to the catalogue, and the catalogue only,

(1) 3 A. & E. at p. 371.

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which every purchaser or intending purchaser who attends the sale has in his hands, and the only document, as far as we know, in the present case of which the purchaser had any knowledge. The other document, which contained the price, was a document prepared by the auctioneer manifestly for his own use. It contains secret information, such as the reserve price put upon the horses, which was not intended to be communicated to the public. There being no reference in either of these documents to any document that contains the whole contract between the parties, on the authority of *Dobell* v. *Hutchinson* (1) I am of opinion that the decision of the county court judge was right, and that the appeal must be dismissed.

ARCHIBALD, J. I am of the same opinion, and I think the judgment of the county court judge was right. As regards the first point, whether there is a contract within the Statute of Frauds, apart from the letter of the 28th of March, I think it is quite clear there must be, to satisfy the statute, either a written contract complete in itself, or a contract in writing on different papers, referring to each other in such a manner as to shew they are parts of the same contract. No doubt the reference may be made in various ways, but it must be of such a nature as to make it clear that the one does refer to the other; and on that point there seems to me to be a failure here to connect these two documents together. It is impossible to do it except by the intervention of parol evidence. That would be going beyond any purpose for which parol evidence is admissible, which is merely to explain a latent ambiguity, and therefore there is no sufficient connection between the papers to constitute a contract within the Statute of Frauds. Then, with regard to the letter, I was at first impressed with the argument of Mr. Herschell that the letter must be taken to refer to the sales ledger and the catalogue, but his argument goes too far, because it must go to this length, that the letter must be taken to refer to any and every document having reference to this sale. Now I think it is impossible to support the argument to that extent. The letter can only be taken to refer to the catalogue that was in the hands of the auctioneer at the time the

(1) 3 A. & E. 355.

sale was completed, and there is nothing here that can in any way connect it with the entry in the ledger. I think the evidence fails to bring the case within the decision of *Bird* v. *Boulter* (1), in which it was held that there was authority in the auctioneer's clerk to make the entry on behalf of the highest bidder. There is nothing equivalent to that here. There is, therefore, no sufficient contract to satisfy the Statute of Frauds, and I agree that the decision of the county court judge was right.

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Judgment for the plaintiff.

Attorney for plaintiff: *J. Speechley.*
Attorneys for defendant: *Chester, Urquhart, Bushby, & Mayhew.*

THE QUEEN *v.* THOMAS CASTRO, OTHERWISE ARTHUR ORTON, OTHERWISE SIR ROGER CHARLES DOUGHTY TICHBORNE, BARONET.

1873*
Jan. 29.

ONSLOW'S AND WHALLEY'S CASE.
SKIPWORTH'S AND THE DEFENDANT'S CASE.

Contempt of Court—Pending Trial—Practice.

When a true bill has been found, and the indictment removed into the Court of Queen's Bench, and a day fixed for the trial, the case is pending; and it is contempt of Court to address public meetings, alleging that the defendant is not guilty, and that there is a conspiracy against the defendant, and that he cannot have a fair trial. And the Court will rule the parties offending to appear in court to answer for their contempt; and on their appearance will fine and imprison them at the Court's discretion.

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RULE, by which on reading the three indictments in this case and certain affidavits and exhibits, it was ordered that Guildford Onslow, Esquire, M.P., and George Hammond Whalley, Esquire, M.P., do attend this Court on Monday, the 20th day of January, 1873, peremptorily, to answer for several contempts of Court committed on the 11th and 12th days of December, 1872, by taking part in the meetings and uttering and being present at the uttering of

(1) 4 B. & Ad. 443.

* Decided in Hilary Term, 1873; the report has been unavoidably delayed.

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the words mentioned in the affidavits and exhibits, and shew cause why they should not be punished and dealt with as the Court shall think fit for the contempts aforesaid.

It appeared from the affidavits upon which the rule was obtained, that an ejectment had been brought in the Court of Common Pleas, of *Tichborne* v. *Lushington and Others*, the question being whether the claimant was the person he represented himself to be, viz. Sir Roger Charles Doughty Tichborne, Baronet. On the 6th of March, 1872, the trial having lasted several months, the claimant elected to be nonsuited, in consequence of the expression of opinion by the jury against his alleged identity, and the presiding judge, Lord Chief Justice Bovill, directed, under 14 & 15 Vict. c. 100, s. 19, that the claimant should be prosecuted for perjury committed in evidence given at the trial. He was committed to prison accordingly, but was afterwards bailed.

On the 8th of April, 1872, three true bills for perjury and forgery were found against the claimant by the grand jury at the Central Criminal Court; and the indictments were afterwards removed by certiorari into this Court; and in Michaelmas Term, 1872, on the motion of the Attorney General, the prosecution being conducted by the Treasury, the indictments were ordered to be tried at Bar, and the fifth day of the then next Easter Term was fixed as the day for commencing the trial.

On the 11th of December, 1872, the claimant and his friends and supporters held a meeting in St. James's Hall, Piccadilly, in the county of Middlesex, Mr. Whalley being voted to the chair. On taking the chair, Mr. Whalley addressed the meeting, and said, inter alia:—

"You would not have been present here this evening unless you had believed that there was something in the case far beyond the question whether this man, otherwise unknown to the public, had or had not committed perjury. It is not possible that either you or any of the hundreds of thousands who have already assembled, as you are now, can have so little confidence in the law, or can have so great an interest in the mere question whether some individual has committed perjury. There must be in your minds, whether you fully recognise that he be Sir Roger Tichborne or not—there must be in your minds a firm conviction and belief that there is a much greater question than that to be tried, namely, whether there is not a great conspiracy, the greatest, I believe, which has ever been known to the law; and, further, that you do believe that the law of England is unequal to cope duly with and to expose and punish that conspiracy except by the aid

and support of the watchful eye of the public. I don't presume to say on which side the conspiracy exists; but having taken up from public motives alone, and in what seemed to me to be the discharge of a plain public duty, according to my knowledge and to the extent of my power, I may be here permitted to declare that, for my own part, I am no party to any conspiracy on his side. And, what is more, so far as it is possible for a man to be convinced of any one thing under the sun, I am thoroughly convinced that no such conspiracy does exist or ever has existed on his behalf to enable him to obtain possession of this title and estate of Tichborne. The question is, whether there is a great conspiracy involved in this case on one side or the other; and you are a jury fairly and properly impanelled to decide on which side that conspiracy exists."

Mr. Onslow then addressed the meeting:

"It may be as well that I should explain to you that our object in addressing the British public had its origin on these grounds: We were refused in the House of Commons replies to questions we put to the ministers. Our mouths were shut in that House, and knowing, as we do, that we are supporting the right man in a good and honest complaint, we have nothing left but to appeal to public opinion. We don't ask you to say whether he is or is not Sir Roger Tichborne; but we ask you to say and believe that he is an Englishman, and, as an Englishman, that he is justly entitled to fair play, which is the birthright of every one of our countrymen. Now, I maintain that in the late trial he did not receive the fair play he is entitled to. The long-winded speech of the Attorney General, lasting twenty-one days, was never replied to, and we have a perfect right to assume that had Serjeant Ballantine been permitted to reply, he would have turned the minds of the jury and of the public as much as they were turned by the Attorney General."

Mr. Onslow went at considerable length into various parts of the evidence in support of the claimant; and after complaining of a trick which he said had been played upon the claimant by the Attorney General in putting forged letters into his hands, and of the "other side" being allowed by the Court to "smudge out" a photograph which proved the claimant's identity, without reprimand, concluded: "It is not justice; but we appeal to you, the British nation, to watch their play."

A second meeting was held on the next day, the 12th of December. Mr. Whalley addressed the meeting, Mr. Onslow being present. He said, inter alia, that there has been an unanimous verdict at all the meetings which had been held on behalf of the claimant "to this effect: first of all, that they are satisfied that this man is truly Sir Roger Tichborne; and, secondly (and that is a point which it is my business to address you upon this evening), that there is indeed a conspiracy in this case." The meeting

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would have a difficulty in believing "that there can exist such a conspiracy so wide-spread, so black, so utterly incomprehensible, entwining its roots through so many institutions of our country."

Mr. Whalley then proceeded as follows:—

"There are, then, gentlemen, in this case two questions. In the first place, is this man truly Sir Roger Tichborne? In the second place, is that fact known? Now, mark and observe this, because these are words which I speak with a due sense of responsibility to those whom I meet in social life, to the House of Commons, where I have and shall again pledge all that I have worked and laboured for during twenty years on the strength of my convictions—is that fact, if fact it be, known to the Attorney General? Has it been known to him throughout this prosecution? Is it known to Her Majesty's Government, or to Mr. Gladstone, or, which is the same thing, have they given 100,000*l.*, or whatever other money they have given, out of your pockets, have they given that money to prosecute this man and to convict him of offences without taking the ordinary and proper means at their command for ascertaining the fact whether he be really guilty of perjury or not? . . . I have charged the Tichborne family, I have charged directly and in print the Doughtys, the Radcliffes, and the whole lot of them together, with knowing that he is the man, and combining in a conspiracy against him. Now, ladies and gentlemen, you will naturally say, how can we listen to such a Don Quixote as that? What a fool that man must be to throw himself into a quarrel that in no manner concerns him, merely as to the question whether this gentleman or somebody else is entitled to certain estates in Hampshire, and here it is, ladies and gentlemen, that I come to the real question which concerns you and me, and the hundreds of thousands of men that I have addressed throughout the country. Here we come now to the public question. Gentlemen, the time has not come when either I should be justified in speaking or you would be prepared to listen to those possibilities of conspiracy in a matter of this kind, which I do believe, it is my hope, my expectation, the very object for which I exert myself in this case, will in due time become more fully developed and understood by the people of this country. What is the nature of this conspiracy? What is the origin? What are the grounds on which, six years ago, these people met in a drawing-room in London, and said, 'We will defy the laws of England, we have these estates; here is the man; it is not expedient that this man should have these estates, we will keep them; we are strong enough in Parliament, strong enough on the judicial Bench, strong enough in society to defy the laws of England.' Gentlemen, I am not prepared to enter into that to the extent I feel it. I say that I live in the hope that the time will come when it will be quite legitimate to address you on the nature of that conspiracy against Sir Roger Tichborne which I state here to-night, in accordance with a challenge which I gave three months ago at the last public meeting in London, in Oxford Hall, to this effect:—That I should be prepared to meet the Attorney General or any of the six counsel most eminent at the Bar, or any other advocates that he might put forward, and to satisfy any intelligent London audience that it was not consistent with the facts of this case, as I should present them to you, that he did not know throughout that trial that he was prosecuting, that the claimant was Sir Roger Tichborne, and that he, and the Government

afterwards at his advice, do now at this moment know, or that they have the means of knowing, that it is so; that in sustentation of their conspiracy for the purpose of retaining these large estates in the hands of the Arundel family, the leading family, as we know, in a certain influential circle of society—for the purpose of retaining these estates in that family, and sustaining the whole course of their conduct from first to last, that they do know, or, as I say, have the means readily of knowing, that they are attempting to prosecute to conviction, to penal servitude, or again to Newgate, a man whom they know to be innocent of the charge brought against him."

Mr. Onslow also addressed the meeting, chiefly urging subscriptions in support of the defence, and a resolution was passed on the motion of Mr. Whalley:

"That this meeting declares its opinion, in common with the country at large, that the prosecution of the claimant at the public cost was uncalled for, and in the absence of explanation which has been refused, wholly unjustifiable, and demands public reprobation; and that the support and sympathy of the British public are justly due to the claimant."

Jan. 20, 1873. Mr. Onslow and Mr. Whalley being present in court,

Sir J. B. Karslake, Q.C. (with him *A. L. Smith*), for Mr. Onslow, read an affidavit in which that gentleman referred to his old friendship with the Tichborne family, and his promise to Lady Tichborne, who believed the claimant to be her son, to support his cause. That at Lady Tichborne's death the claimant was without funds, and he, Mr. Onslow, accordingly attended meetings held by the claimant and his supporters, in order to obtain funds for his defence. That the meetings of the 11th of December and the 12th of December, 1872, were meetings called for that purpose. In the observations which he made, his intention and object were to counteract the feeling of prejudice existing against the claimant, so that he might, if possible, go into court to meet his trial for the criminal offence alleged against him unprejudiced by the result of the trial at Nisi prius, and the comments which had been made upon him in the course of it. That, although it was now obvious to him, Mr. Onslow, that such observations, made with the sole object and purpose aforesaid, might be considered to have the effect of reflecting upon the character of witnesses and the conduct of the prosecution, it did not occur to him that such was or might be the effect. He had not the slightest intention of prejudicing, or inter-

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fering with, or preventing the course of justice, and it was with great regret that he had taken a course unwittingly, which could be looked upon as indicative of having ever entertained any such intention. He repudiated having any knowledge of what Mr. Whalley intended to say, and concluded thus: "At the time I made the observations complained of I had no intention whatever of interfering with the course of justice in the trials which are now pending. I made such observations under the circumstances and with the objects only above stated. As soon as I read the report in the public papers, of the motion to this Honourable Court, I saw that I had been betrayed into taking a course which laid me open to the imputation of having, in trying to remove prejudice operating against the claimant, created prejudice against the prosecution, and thereby, pending a trial, improperly commented upon matters connected with it; and I desire to express my unfeigned regret at having taken such a course, and to apologise in all sincerity to this Honourable Court for the conduct for which I am arraigned."

The only point of law is whether the indictments can be said to be pending, the trial not having yet commenced.

[COCKBURN, C.J., intimated that the Court had no doubt on this point; and inquired whether Mr. Onslow, in expressing his regret for the past, was prepared to promise not again to take part in any such proceedings.]

Most undoubtedly.

Digby Seymour, Q.C., *Morgan Lloyd, Q.C.*, and *Macrae Moir*, for Mr. Whalley, endeavoured to palliate his conduct; but the Court intimated that they had no doubt that he had been guilty of gross contempt, referring to *Lechmere Charlton's Case* (1), and inquired whether Mr. Whalley concurred in the apology and promise made on behalf of Mr. Onslow. Counsel intimated that he did.

Hawkins, Q.C. (with him *C. Bowen*), for the prosecution, pointed attention to the paragraphs of the speeches above set out, and left the matter to the Court.

COCKBURN, C.J. Mr. Guildford Onslow and Mr. George Hammond Whalley,—I express the unanimous opinion of the Court of

(1) 2 My. & Cr. 316, 342.

Queen's Bench, that in the proceedings set forth in the affidavits, upon which you have been called upon by this Court to answer, you have been guilty of gross and aggravated contempt of the authority of this Court.

We are far from saying that where persons believe that a man who is under a prosecution on a criminal charge is innocent, they may not legitimately unite for the purpose of providing him with the means of making a full and effectual defence. It is unnecessary to say that the expression of that belief, even in public, by way of an appeal to others to unite in furnishing means for the defence, is not a matter which, though not perhaps strictly regular, could be made matter of complaint and punishment. We quite agree that it would be a harsh and unnecessary proceeding to interfere with the expression of an opinion honestly entertained, and bonâ fide expressed for a legitimate purpose; but when, at a meeting, held, it may be, for the purpose only of providing funds, language is used which amounts to an offence against the law and contempt of a Court which has to administer the law, the motive or purpose for which the meeting was held affords no excuse whatever, still less any justification, for the improper language used. When, in consequence of the jury before whom the man gave evidence as a witness on the trial having declared their disbelief in the evidence he gave, the learned judge who presided at the trial has directed a prosecution for perjury against him; when a grand jury, the proper and constitutional tribunal, have found true bills of indictment for the serious crimes of perjury and forgery—that that man should be paraded through the country and exhibited as a species of show in public assemblies for money as the victim of injustice and oppression; that at those meetings violent and inflammatory language should be used, and the witnesses who appeared adversely to him at the former trial be held up to public odium and reprobation, and as having been guilty of perjury; that the counsel employed against him and the judge and jury who sat at the trial should be reviled in terms of contumely and opprobrium, and, what is still more and immediately to the present purpose, that the merits of the pending prosecution should at such meetings be canvassed and discussed, and the evidence which will be given at the coming trial made a matter of public observation

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and discussion; when not only does this take place in the provinces, but the matter is brought as it were within the precincts of this Court, and within the district from which the persons are to come who will pass in judgment between the Crown and the accused upon the coming trial, one cannot shut one's eyes to the fact that there is here an outrage upon public decency, and a great public scandal committed, and that the even and ordinary course of justice is unwarrantably interfered with. This Court, therefore, cannot hesitate, under such circumstances, to exercise the authority which it undoubtedly possesses, of preventing public discussion upon a trial pending in this Court. It has been attempted to be contended to-day on your behalf that the meetings in question were convened solely for the purpose of obtaining money in order to enable the accused to carry on his defence, with the additional purpose of removing any prejudice which the result of the former trial may have produced against him. But that, as I have said, affords no excuse, if the language used on these occasions has been such as to amount to an unwarrantable interference with the course of justice with reference to the coming trial. Here we find gentlemen of your station and position, gentlemen of education, and members of the legislature, have condescended to lend themselves to proceedings of this kind, and to hold the language which you have held on these occasions. One can only express astonishment and regret when it is said that this could have been done without consciousness that it was an offence against public justice and against this Court, and might have the effect of creating prejudice with reference to the approaching trial. We can only accept that apology, if we do accept it, at the expense of the understanding of those who made it. There cannot be, I should apprehend, the slightest doubt in the mind of any right-thinking man that a course of proceeding of this kind, if it were allowed to take place, must be calculated to interfere most seriously with the course of public justice. If it is open to those who take the part of the accused to discuss in public meetings the merits of the prosecution in the interest of the accused, it is obvious that it must be equally open to those who believe in the guilt of the party accused and the propriety of the prosecution, and believe a conviction necessary to the ends of justice, to collect meetings and to hold

language of the opposite tendency; and thus the course of justice might be interfered with and disturbed by discussions taking place outside of the walls of a court of justice, but which might in the end influence the proceedings within it. It is clear that this Court has always held that comments made on a criminal trial or other proceedings, when pending, is an offence against the administration of justice and a contempt of the authority of this Court. It can make no difference in principle whether those comments are made in writing or in speeches at public assemblies. Neither can it make any difference in principle whether they are made with reference to a trial actually commenced and going on, or with reference to a trial which is about to take place: we can have no hesitation in applying to the one the same rule which we should apply to the other; and we think, therefore, the counsel for the Crown have done no more than discharge their duty in bringing this case to our attention. The case having been brought to our attention, we must deal with it in such a manner as shall repress and prevent the possibility of such improper and indecent proceedings in future. We are glad to find on this occasion (although there have been some attempts made to distinguish this from other cases, in which the Court interfered with its summary authority) that both parties have, through their counsel, submitted themselves to the Court, and have given a clear and distinct pledge that they will take no part in objectionable meetings of this character in future. If there had been any hesitation or reluctance in giving that pledge, if there had not been a submissive attitude which both you gentlemen on the present occasion, I am glad to think, have adopted, and a full apology, the Court would have thought it its duty to use the full power and authority it possesses of imposing a substantial fine, and imprisonment in addition to the fine. We are happily spared the necessity for that by the wise, prudent, and proper line of conduct which you have, under the advice of your counsel, adopted to-day; but it must be distinctly understood that, in inflicting the pecuniary penalty we are about to impose, we have gone to the extreme of moderation; and that if upon any future occasion a proceeding of this kind shall be repeated, the full power of the Court, which it undoubtedly possesses to restrain and prevent such proceedings

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by adequate and commensurate punishment, will be exercised with a stern, unhesitating, and unflinching hand.

The mischief in the present case, so far as its effect on the proceedings in this court is concerned, has happily been very trifling. The thanks of the public are in my opinion due to the metropolitan press for its admirable conduct in forbearing to give the publicity you desired to these objectionable proceedings; but your intention was not less reprehensible, and your conduct not less open to severe animadversion. However, looking at all the circumstances of the case, we think, considering the position you have taken up to-day, and the pledge you have given, a pecuniary penalty of moderate amount—I say moderate with reference to the circumstances of the case, the contempt having been, in our opinion, a very gross and aggravated one—will satisfy the exigences of public justice; but let it be understood that leniency will be appealed to in vain if any other person shall be brought before the Court charged with, and proved to be guilty of, similar contempt.

The sentence of the Court is that, for the contempt you have been guilty of, you each be adjudged to pay a fine of 100*l.* to the Queen, and that you be imprisoned until that fine be paid.

My Brother Blackburn suggests, and I readily acquiesce, that with gentlemen in your position in society, it is unnecessary, when imposing a fine of 100*l.*, to add what is usually added, "and to be imprisoned until the fine be paid," because it is perfectly certain that there will be no difficulty with regard to that matter; therefore the sentence is solely, that each of you pay 100*l.*

PER CURIAM (COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, JJ.):

Judgment accordingly.

Jan. 21. COCKBURN, C.J. I find that an impression has gone forth, that in remitting that part of the judgment of the Court which pronounced that until the fine was paid the parties guilty of contempt should suffer imprisonment, I am supposed to have acted in consequence of anticipating some difficulty with reference to the imprisonment of Members of Parliament, by reason of some privilege which, as Members of Parliament, they possess. This is

entirely a mistake. Judgment of imprisonment is only pronounced in order to insure the payment of the fine; and I was reminded by my Brother Blackburn that the payment of the fine might be enforced without having recourse to imprisonment; and it occurred to us that, looking at the position in society of the parties and their ability to pay the fine, and to the fact of there being other means of enforcing it, there was no necessity to add "and to be imprisoned till the fine be paid." It was on that ground alone that that part of the judgment was remitted. I expressly intimated, in the course of the judgment which, with the concurrence of my learned Brethren, I pronounced, that if there had not been a perfect submission to the Court on the part of both of the defendants, and the clearest and most positive assurance that there should be no renewal of the offence in question, we should have thought it our duty to add the punishment of imprisonment to that of pecuniary penalty. The possibility of coming into any collision with the House of Commons did not appear to us a thing which we could believe would ever occur, because, in the case of *Mr. Wellesley* (1), as also in that of *Mr. Lechmere Charlton* (2), both of whom were committed for contempt of the Court of Chancery, the House of Commons declined to interfere on the score of privilege; and I am sure the House of Commons would not desire to interpose the privilege of its members in order to prevent the imprisonment, if necessary, for contempt of the administration of justice in the face of this Court. I am anxious there should be no misunderstanding on a matter so important as this, and I have thought it, therefore, necessary to correct the impression which seems to have gone forth in regard to the ground on which we proceeded as to the latter part of our judgment.

Attorney for prosecution: *Solicitor to the Treasury.*
Attorney for Mr. Onslow: *E. Bromley.*
Attorneys for Mr. Whalley: *W. Moojen & Sons.*

(1) 2 Russ. & My. at pp. 642—644. (2) 2 My. & Cr. 316, 346—351.

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Jan. 25. *Hawkins, Q.C.*, moved for a similar rule against G. B. Skipworth, Esq., barrister-at-law, for contempt, committed at a meeting at Brighton on the 20th of January.

It appeared from the affidavits, that Mr. Skipworth, who was the chairman of the meeting in St. James's Hall, on the 12th of December, also took the chair at a similar meeting held at Brighton on the evening of the 20th of January. On taking the chair Mr. Skipworth said:—

"Ladies and Gentlemen,—It is encouraging to find your reception after the degrading spectacle I have witnessed in the Court of Queen's Bench to-day in London. Nothing less than this, that two honourable members of Parliament had been brought up, I may say, as criminals for advocating truth and justice throughout the country. Yes, it was a sad spectacle for England that we have come to this. No less than a great infringement upon our rights and liberties! If they had a just cause on the other side you may depend upon it it would never have been done. What do they mean, when they rob a man of everything he possesses? I will go on to advocate the cause of my friend Sir Roger Tichborne. I live quietly upon my own estate. I have my home and family and friends; I have my affairs to attend to; but when duty calls me forth I obey the call, and when I see such degradation as I witnessed to-day, these honourable men brought up and treated as criminals, and obliged to apologise in the most degrading way, and fined for doing their duty to their fellow-countrymen, I remember that I was chairman of that meeting their conduct at which was called in question. The Lord Chief Justice, in his judgment, professed how mild and moderate he was to them as they had apologised, and that if anybody else should offend in the same way he should be treated with the full rigour of the law, not only with a fine, but with imprisonment. I hurl this intimation back with the contempt with which he treated these honourable persons. I care not for his intimidation. I will stand here where my duty calls me in defiance of his vulgar threats. I am not going to be intimidated when my age and I will say duty to my country calls me forth. I could see there was no chance of justice being done by those four judges from the first. I could see that their minds were made up to convict my friends. And what was this, but to prevent free public discussion in this country? I would have cut my hand off before I would have acknowledged that I had been doing wrong, and apologised when there was nothing to apologise for. I would let them send me to prison rather than have acknowledged what was untrue. Better the dungeon than such a degradation. What is life worth without liberty and honour? If this man be Sir R. Tichborne, then there is a conspiracy to keep him out of his estates. And I say that Lord Chief Justice Cockburn was not the fit person to try anything in connection with the case. I am sorry to say that he has so long prejudged the case that he is unfitted to try the case as an impartial judge."

The affidavits also shewed that the defendant had himself

addressed the meeting, and in the course of his speech, after going through the course of the trial of the ejectment at length, and alluding to what the Attorney General had said and done at the trial, he proceeded:—

"The Attorney General also said in the House of Commons that it was an insult to common sense to call me Tichborne. Then why should not I call on him to come forward for contempt of court in prejudicing me before trial. I will go further than that, for I am determined to see to the bottom of it. Four years ago the Lord Chief Justice of England publicly denounced me as a rank impostor at his club. I know of other occasions, but cannot prove them, so will not mention them. But I can prove that subsequently, within these last two months, at a party where a lady friend of mine was, he distinctly turned round in a very angry manner to those ladies and said it was a disgrace to mention my name in decent society. I think I have a right to call upon him to answer for contempt of court; I do not suppose they will grant the rule; but rest assured I will apply for it. And I maintain, ladies and gentlemen, that he had no right to sit on that bench to-day. At St. James's Hall my friend Mr. Onslow stated that the Lord Chief Justice was not a fit justice to sit on my forthcoming trial. He gave as his reasons those I have mentioned, and that he had also, during the late trial, while sitting by the side of Judge Bovill, written on a piece of paper,—'Had I been judge and you leading counsel, we would have had this fellow in Newgate long ago.' He was a party concerned, and if he had the slightest delicacy for his honour he would never have sat on the bench to-day. So much have I heard that I intend to petition Parliament against his sitting on my forthcoming trial. No doubt I shall be able to prevent him. If I do not I will go into that court without counsel, attorney, or witnesses, and let him crush me as he thinks proper. If the Lord Chief Justice has got to sit and adjudicate in my case I will offer no evidence, but throw myself upon the country."

Upon the reading of these affidavits, the Court (Blackburn, Mellor, Lush, and Quain, JJ.) directed that a rule should go against Mr. Skipworth and the defendant also, though the prosecution had applied against the former only.

Jan. 29. Mr. Skipworth and the defendant were present in court pursuant to the rule; neither appeared by counsel.

Mr. Skipworth had filed an affidavit, in which he sought to justify his conduct; and he avowed that he attended the meeting at Brighton with the distinct intention of setting the "threat" of the Court at defiance.

The defendant sought to palliate his conduct under the peculiar circumstances of his case; and he appealed to the Court that if they fined him or sent him to prison he could not pay and would be prejudiced in preparing his defence.

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BLACKBURN, J. In this case there have been two persons brought before us who were called upon by an order of the Court to show cause why they should not be committed for a contempt of Court; and the first question upon which the Court is to decide is, whether, under the circumstances, what has taken place is contempt of Court, and whether the Court can adjudge them to have been guilty of contempt.

The phrase "contempt of Court" often misleads persons not lawyers, and causes them to misapprehend its meaning, and to suppose that a proceeding for contempt of Court amounts to some process taken for the purpose of vindicating the personal dignity of the judges, and protecting them from personal insults as individuals. Very often it happens that contempt is committed by a personal attack on a judge or an insult offered to him; but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself; and there would be scarcely a case, I think, in which any judge would consider that, as far as his personal dignity goes, it would be worth while to take any steps. But there is another, and a much more important purpose, for which proceedings for contempt of Court become necessary. When a case is pending, whether it be civil or criminal, in a Court it ought to be tried in the ordinary course of justice, fairly and impartially. In the present case there has been an indictment preferred against one of the persons now before us for perjury, and that indictment stands to be tried, and will come on in due course of trial at law to be tried, and it ought to be tried fairly and impartially, the judge and jury deciding on the evidence produced, subject to cross-examination in the presence of both parties, each party making his comments in the presence of each other and the presence of the judge, and the case should be then fairly and properly tried in that way.

Now, it may happen, and in many cases does happen, that persons interfere for the purpose of preventing that ordinary course of justice. There are many decided cases in which such an attempt has been made; sometimes it has been done by an attack upon the judge, though comparatively rarely. Sometimes it has been done by trying to induce the judge to change his opinion by

flattery, and even in some cases by offering bribes to him. There have been attempts made to change the ordinary course and cause the judge to take a particular view of the matter. More commonly the mode adopted has been that of an attempt to influence the trial by attacking, deterring, and frightening witnesses, or by commenting on the case, or, as it is called, appealing to the public, and endeavouring, by statements made ex parte, without the other side being heard, and without the means of testing the matter which the law requires, to prejudge the case and prejudice the trial; and in all those ways great mischief may be done by interfering with the due and ordinary course of law, and causing justice, whether criminal or civil, not to be administered in the way which is ordinarily pursued. Most things which are done in that way may be liable to punishment by the criminal law, or they may be conspiracies punishable by the criminal law, or they may be assaults punishable by the criminal law; and generally, if there are attempts to influence the due course of justice, they would be punishable by the criminal law. But then, if we are to wait for that to be done by ordinary criminal process and an ordinary trial, there might be great mischief done, because that process is slow, and before that process could come into train the mischief would be done by the due administration of justice being hampered and thwarted. For that reason, from the earliest times the Superior Courts at Westminster, the Superior Courts of Record, the Courts of Equity and the Courts of Common Law, have always had power to deal summarily with such cases. When an action is pending in the Court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the Courts, by the exercise of a summary jurisdiction, to deal with and prevent any such matter which should interfere with the due course of justice; and that power has been exercised, I believe, from the earliest times that the law has existed. It certainly has been exercised in the manner in which we now exercise it. (1) The Courts

(1) See *Lechmere Charlton's Case* (2 My. & Cr. 316) in Chancery; and see Hawkins', P. C. b. ii. ch. 22; vol. ii. p. 206, 8th ed. by Curwood; vol. iii. p. 272, 7th ed. by Leach, as to the practice in the Court of Queen's Bench.

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of justice being clothed by the law with that power, a duty is cast on the Court, in a proper case, and where they see it is necessary that the Court should summarily interfere to prevent something that would obstruct the due course of justice, to exercise that power. In the present case counsel for the prosecution did not ask that the defendant should be brought before us. We thought, however, on the materials before us, that there was a case made out of his being a party to the obstruction of justice; and thinking there was a primâ facie case, and that the interposition of the Court was required to prevent a course continuing which would obstruct the due administration of justice in a case now pending before us, we thought it right to order that the defendant should appear here to-day. He has attended here to-day, and has defended himself, and we have listened to what he said, and I am bound to say that he has defended himself with great propriety, and, making a proper allowance for his want of technical knowledge, has brought forward all the points that could be brought forward by the best counsel in his defence. Nevertheless, we have to consider now whether or not he has not been guilty of a contempt of Court within the definition I have given. The defendant urged that we ought to allow the case to go to trial before a jury, because he might prove the truth of what he had alleged. The truth of it has nothing to do with the question. The question at present is, is he trying to interfere with the course of justice? I hope and trust that justice will be done, whether he be innocent or guilty, but that will be tried and determined in the due course of law, and after hearing both sides fully and completely. But, however true the statements made might be, to prejudge the trial is none the less a contempt of Court, and one which we must check. We make no inquiry whether the statements are true or false, but what we do inquire is, whether the proceedings which have been taken are such as to shew it is intended to divert and change the course and prevent the ordinary course of law, and to prejudge the question by what is called appealing to the public, so as to prejudice the minds of the jurors who may come to try the case, or perhaps to deter the jury from pursuing the course they would otherwise take. I do not think it necessary to cite authorities to shew that the view of the law I am now pronouncing is no novelty,

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but has existed for centuries; but I would refer to one case, and one case only, for the sake of the language which Lord Cottenham uses in reference to the matter, which I think most accurately expresses the law, and also because it is a case in which a considerable number, but far from being all the cases, were cited: I mean *Lechmere Charlton's Case* (1), where there had been an attempt to interfere with the course of justice in the Court of Chancery by letters threatening the master in Chancery. Lord Cottenham, in considering the matter, made an order, not on the motion of the party, but just as we have done here, an order of the Court itself, the Court taking notice of things brought before it on affidavits. Mr. Lechmere Charlton was ordered to attend and to answer the charge. Mr. Charlton, relying on his privilege as a member of Parliament, would not come, and then Lord Cottenham adjudged him guilty of contempt and passed sentence of imprisonment; and, in doing so, after citing a great many authorities, he proceeds with this passage, which I will read: "All these authorities tend to the same point; they shew that it is immaterial what measures are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course. It is a contempt of the highest order; and although such a foolish attempt as this cannot be supposed to have any effect, it is obvious that if such cases were not punished, the most serious consequences might follow. If I consulted my own personal feelings upon the subject, I should pass by these letters as a foolish attempt at undue influence; but if I were to adopt that course, I should consider myself guilty of a very great dereliction of my high duty. The order must therefore be made absolute for the committal of Mr. Charlton to the Fleet." (2)

I quote those words of Lord Cottenham because they really do express very nearly the kind of feeling which I have myself, and which I believe my Brothers also entertain and feel on the subject. Certainly it seems to me impossible, on hearing these proceedings, to doubt that both these persons who are brought before us have been guilty of an attempt to change the course of justice; both have attempted to deter by vituperation the Lord Chief Justice from taking any part in the trial, and to prejudice

(1) 2 My. & Cr. 316.

(2) 2 My. & Cr. at p. 342.

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the trial by attacking the witnesses themselves, and also have attempted to what is called influence the public mind of the people, which is in other words to prejudice the jurors. That they have done this, and that they intended to do so, I cannot doubt. Mr. Skipworth has in so many words said he did intend to do that. There can be no question that such was the purpose here, and I cannot but think that that is a contempt. Then we have to consider whether it is not a foolish attempt such as Lord Cottenham refers to. Certainly I think it is, as far as the contempt here constitutes an attempting to alter the course of justice, because it is an attempt which would be utterly ineffectual, and which no one, I think, who knows anything about it could ever imagine could be effectual at all. Before we ever heard anything about these meetings, it came to be a question whether this case was to be tried before a single judge at Nisi Prius, or whether it was to be a trial at Bar, which is a trial where the Court is not presided over by an individual judge, but where three judges sit, and the senior judge present, who possibly may not be the Lord Chief Justice, presides, and where whoever presides has no more authority than those sitting with him. Each has an equal voice in ruling what the law is, and if there is a difference of opinion each has a right to express it, and I believe in the old times there have been instances—indeed there was one remarkable instance, *The Trial of the Seven Bishops* (1), where every one of the four judges, taking a different view of the law, gave contradictory summings up to the jury, which resulted in the acquittal of the Bishops, which I believe was certainly right. Before the application for a trial at Bar the Lord Chief Justice had stated that this case was likely to be a case of such length that it was desirable that more than one judge should sit, and that he thought that at the trial other judges should sit and assist him, and as it was likely to be a trial of great magnitude all of us agreed that it would be a very desirable course. As it was, the Attorney-General, exercising the undoubted prerogative of the Crown, required a trial at Bar, and it was granted as of course. I mention this to shew that it was the Lord Chief Justice's personal desire that the case should be tried not before him alone, but before the Court. Now, when that course has been settled and the case is

(1) 12 How. St. Tr. 183; 3 Mod. 212.

pending, we find these meetings held for the purpose, amongst others (of which there can be no doubt from the affidavits), and with the intention by vituperation of preventing the Lord Chief Justice sitting upon this trial. I need hardly say that it will have no such effect. I may say there is not the slightest doubt, and never has been the slightest doubt in the mind of any one individual in the Court, that it would have been a great dereliction of duty if we were in the slightest degree to alter the arrangement in consequence of these meetings which have been held; and the Lord Chief Justice himself was of opinion that it was his duty to preside at the trial, and every individual member of the Court agrees with him. There have been here vituperation and attacks made concerning what the Lord Chief Justice is supposed to have said or done. It is not right that a judge, or a person occupying the position of the Lord Chief Justice, when personal attacks are made on him, should come forward and meet them and explain them, and that is well known to those who make the attack, and certainly that knowledge does in my mind render the conduct of those who attack a judge in that way, to use the mildest term, neither just nor decorous. We say nothing whatever consequently about these imputations. But I must proceed further. I think that I may say with propriety, as it has been arranged that I am not to be one of the judges who should try the case, that I have the firmest conviction that when the trial comes on it will be conducted by those who are on the Bench, as it would have been if nothing of this sort had been said or brought forward, with absolutely the same impartiality, the same care to see that in all that is done every point that makes in favour of the defendant in the indictment shall be fairly and properly considered, and at the same time with the same firmness of intention to see that justice is done, with which the trial would have been conducted, had the case come on in the ordinary course of justice before judges who had never heard a word about it until they took their seats on the Bench to try the case.

Now if it were, as Lord Cottenham said, a matter of consulting my own personal feeling, I should pass it by as being an ineffectual attempt, which was utterly incapable of producing the effect intended; but I think we cannot possibly do so without a dereliction of

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duty, to use Lord Cottenham's words. We all agree in that, that we could not possibly pass it by. I am greatly influenced by this, that though here they attempted to influence the people by what is called appealing to the public, though that in the present case is utterly ineffectual, yet it may very well occur in future times that there may be instances in which that would be far from ineffectual and inoperative. The attempt might be very formidable, and require much nerve to resist it. We may imagine a possible case of a person, indicted for sedition or for high treason, going about and assembling people and addressing them, and it certainly would require considerable nerve to resist the influence which might be raised; and if we allowed ourselves to pass by the case in which the claimant has been doing the very thing that would be done there, when it came to be a case of that sort our successors would be obliged to do their duty, and if we did not now interfere we should be creating a precedent which would greatly increase their difficulties of dealing with it. That is one of the things which greatly influences me, and I think, besides, its being a public scandal is not to be disregarded. It is absolutely essential that these proceedings should be stopped.

Looking, therefore, at the fact that both the persons before us have attended these meetings with the intention of influencing and altering the course of justice and prejudicing the trial of the case, we can come to no other conclusion than that they have been guilty of a contempt of Court.

Having come to that conclusion, the second question is, what shall be the sentence which is to be passed upon each of these persons. But there is first one thing, which, lest it should be misunderstood, I think it is as well to explain, namely, the absence on the present occasion of the Lord Chief Justice, which might be supposed to be inconsistent with what I have stated. But we have to determine what shall be the amount of punishment for a contempt of Court which partly consisted of personal attacks upon the Lord Chief Justice; and where that is the case there is a risk, of course, that his feelings might cause him to be vindictive, but there is a very much greater risk that, from his anxiety that his feelings should not lead him to give an excess of punishment, he would be too lenient, and consequently it is very desirable

that the matter should be tried and adjudicated upon by persons who are influenced by no such feelings. In a Court of Equity, where the Judge sits alone, this could not be avoided; he must himself decide it, though he himself is personally concerned; but in a Court of Common Law, where there are several judges, the matter can be decided without the presence of the judge who has been personally attacked; and for that reason the Lord Chief Justice was of opinion that it was far better that he should take no part in the present proceedings. I may be allowed to say that I think it was a right and dignified course.

Having said thus much, I come to the consideration of what shall be done in the case of the two defendants. Mr. Skipworth's case I will consider first. I certainly can see no mitigation. He has deliberately from the first come forward, and he avows it, to try and influence the trial of this case, and he asserts the claimant is perfectly innocent, and wishes therefore to arouse the people, as is his phrase, to say that the trial shall proceed no further; and so he goes on doing what was a contempt of Court. Up to last week one might have supposed that he did not know that what he was doing was contrary to law. Certainly it would be going a great way to say that; but last week he was present, according to his own statement, when Mr. Whalley and Mr. Onslow were adjudged to have been guilty of contempt and sentenced to a fine. He heard that judgment in this court, and for the reasons stated then he knew it was a wrong thing and a contempt of Court to interfere further with the proceedings; and having heard this, he goes down to Brighton and attends a meeting to do the same thing the very same afternoon, and announces there that he was present at the hearing of that case of contempt, and uses terms of abuse of the Lord Chief Justice, and I think uses terms not very complimentary to the rest of the Court, and he announces his determination to proceed notwithstanding the warning of the Court. I am reminded by my Brother Mellor that this is done by a person who is a barrister, and ought to have known better; but Mr. Skipworth, although he is a barrister, certainly appears not to be a lawyer. There has therefore been an aggravated offence, and it is absolutely necessary that it should be met by a severe sentence. We must therefore impose a fine, and we must also impose a sen-

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tence of imprisonment. The fine must be sufficient, not only for the punishment of this particular contempt, but also as a warning to other persons. That fine should be sufficient for that purpose, but should not be excessive; and on the whole we think a fine of 500*l.* is the amount which, in our discretion, we ought to impose. Further, there must be a term of imprisonment, so that there may be no continuance of the course which Mr. Skipworth has threatened; and taking into account that the trial will come on in April, and that imprisonment till then will effectually prevent the repetition of this offence, and considering it also as an adequate and proper punishment and not excessive for the offence which has been committed, the second part of the sentence will be that he be imprisoned for the term of three calendar months, and also be imprisoned until the fine be paid.

The defendant in the indictment has committed the same offence. That he intended to influence the course of justice is clear, and he is consequently guilty of contempt; but there are differences in his case; he is a party to the matter, and is a person upon whom the Court would look with some leniency; but although some latitude should be given, he has gone far beyond it in the present case. He also urged in his defence what is true, that he has been attacked by certain portions of the press. If he had confined himself, when going to these meetings, to protesting against the articles in the newspapers, though probably it might have been a contempt of Court, I think it is one which we should not have thought proper to visit with any punishment; but then he went much further, and we cannot but say there has been a contempt of Court, by an improper endeavour to prejudice the course of justice. But then, as he most truly said and forcibly urged in his defence, we must take care, in passing sentence upon him, that we do not pass such a sentence as would have the effect of crippling him in his defence, or in any way prejudicing a fair trial; and I think that there is truth in what he says, that a fine imposed upon him would probably be enough to deprive him of the funds for his defence, and therefore we do not impose a fine. Then if we order a term of imprisonment simply, it might have the effect of preventing him from being able to communicate with his witnesses and conduct his defence. But it is

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absolutely essential that these proceedings should be stopped, and taking all these things into account, we think that the right course to take will be to order him to give security, himself in a sum of 500*l.*, and one or more sureties to the amount of 500*l.*, that he be of good behaviour, and not guilty of any contempt of this Court for the space of three months from the present time, and to be imprisoned until such security be given.

MELLOR, LUSH, and QUAIN, JJ., concurred.

Judgment accordingly.

Attorney for prosecution: *Solicitor to the Treasury.*

[IN THE EXCHEQUER CHAMBER.]

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Feb. 3.

KELLOCK *v.* ENTHOVEN.

Contract of Indemnity—Liability of Transferee of Shares in respect of future Calls—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38—*Proof of Debt—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 153—*Contingent Liability.*

The plaintiff, a holder of certain shares in a limited company, transferred them to the defendant, who transferred them to M. The company was ordered to be wound up, and a call of 40*l.* a share was made on the contributories in Class A., being the existing members, amongst whom M. was placed; these, including M., being unable to pay, the plaintiff and defendant were placed upon the list of contributories in Class B., as past members, under s. 38 of the Companies Act, 1862; and the defendant was ordered in March, 1869, to pay a call of 40*l.* per share. The defendant had executed a deed of inspectorship under s. 192 of the Bankruptcy Act, 1861, which was duly registered in December, 1867. The liquidator of the company proved for the amount of calls against the defendant's estate, but no part was paid: and the plaintiff having paid a sum in compromise of the money remaining due on the shares, sued the defendant for the amount:—

Held, affirming the judgment of the Court of Queen's Bench, that the defendant was liable to indemnify the plaintiff against calls made after the defendant had transferred his interest to M.; and that the claim of the plaintiff was not proveable under s. 153 of the Bankruptcy Act, 1861, and the defendant's deed therefore afforded no defence.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiff on a special case.

The special case is set out at length in the report below. (1)

(1) Law Rep. 8 Q. B. 458.

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The facts sufficiently appear from the judgment of Lord Coleridge, C.J.

Herschell, Q.C. (*Beresford* with him), for the defendant. The question is whether a mere transfer of shares by the plaintiff to the defendant creates in him an obligation to indemnify the plaintiff in the case that has happened. The nature of the obligation is determined by 25 & 26 Vict. c. 89, s. 38, subs. 3: "No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act." The liability therefore of the past member arises only if the existing member is unable to pay, and the Court has to be satisfied of that before the past member can be made liable, so that this is not a liability arising in the ordinary case of principal and surety, but it is a statutory liability cast upon the past member for the benefit of the creditors, if the Court is satisfied that the person who ought to pay cannot pay. The liability arises from the Court being satisfied that the existing member cannot pay, and it is unreasonable to hold that there is an implied contract by the defendant to pay to the past member a sum which the latter only becomes liable to pay because, in the judgment of the Court, the person on whom that obligation is in the first instance cast has been unable to pay. In ordinary cases it is unnecessary to consider the question of ability or inability, because a man undertakes against his own default generally; but the peculiarity of the present case is that this is a statutory liability only created because the Court is satisfied of an inability to pay. None of the authorities cited in the Court below are in point. *Walker* v. *Bartlett* (1) decided that, if the vendee of shares did not choose to register himself as the owner, he was bound to indemnify the vendor against all liabilities for calls. That case does not touch the question as to a statutory liability cast upon a transferor after he has transferred his shares. The Court distinguished that case from *Humble* v. *Langston* (2), and drew a distinction between a claim to indemnify during the time a defendant was beneficially interested and a claim to indemnify after he had ceased to be

(1) 18 C. B. 845; 25 L. J. (C.P.) 263. (2) 7 M. & W. 517.

interested. In *Roberts* v. *Crowe* (1) the question was not raised between two contributories in Class B., but between contributories in Class A. and Class B. respectively. In *Nevill's Case* (2) the question was whether a compromise by the liquidator with a contributory in Class A., disentitled him to recover from a contributory in Class B., and no doubt a dictum of James, L.J., is reported there which is against the defendant's contention, but the point now before the Court did not arise in that case, and though the dictum of James, L.J., is stated by Willes, J., in *Roberts* v. *Crowe* (1) to be an accurate view of the law, still it is only a dictum. *Hudson's Case* (3) is an authority in favour of the defendant.

[LORD COLERIDGE, C.J. My Brother Denman has furnished me with this passage from the judgment in *Maxted* v. *Paine* (4): "It appears that the shares were 50*l.* shares, and that 15*l.* only had been paid up. The sale was at 17 discount, which means that, contrary to the ordinary course of things between seller and buyer the seller was to give 2*l.* to the buyer to take the shares from him. It must be evident that in a sale of shares under these conditions the vendor is selling in order to relieve himself from future liability to calls upon the shares, and, consequently, it is implied in such a contract that a new taker of the shares shall be substituted for him, who will agree to take the liability on himself. In furtherance of this implied understanding, it has been held that the person who assents to be the transferee and has a transfer executed to him, although he is not the original buyer, becomes in privity with the transferor, and is bound to indemnify the transferor from liability to future calls: see *Walker* v. *Bartlett.* (5)"]

In that case the vendee did not register the shares, and the vendor remained on the register, liable as the legal owner of shares; it is not like the present case. On the other point, the deed executed by the defendant is an answer to the plaintiff's claim. If s. 153 of 24 & 25 Vict. c. 134, is read with ss. 74, 75, and 77 of the Companies Act, 1862, it clearly was the intention of the legislature that the bankruptcy of a shareholder should be

(1) Law Rep. 7 C. P. 629.
(2) Law Rep. 6 Ch. 43.
(3) Law Rep. 12 Eq. 1.
(4) Law Rep. 6 Ex. at p. 134.
(5) 18 C. B. 845; 25 L. J. (C.P.) 263.

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a complete discharge from liability. *Re Moor* (1) was relied on in the court below. But the liability of all the contributories dates from the commencement of the winding-up, and this distinguishes the present case from *Re Moor*. (1)

Benjamin, Q.C. (*Gully* with him), for the plaintiff, was not called upon.

LORD COLERIDGE, C.J. In this case error has been brought by the defendant on the judgment of the Court of Queen's Bench in favour of the plaintiff. The material facts are as follows:—It is an action between a past shareholder in a company which has been wound up and a transferee of certain shares which were sold to him by the plaintiff, which shares the defendant afterwards transferred to a person of the name of Mozley. The sale from the plaintiff to the defendant was upon the 4th of September, 1865, the transfer was executed upon the 8th, and the defendant became the registered owner upon the 4th of December, 1865. On the 20th of March, 1866, the defendant executed a transfer of the shares to Mozley. On the 18th of April, 1866, the company stopped payment, and on the 8th of May the company was ordered to be wound up. On the 24th of July, 1866, Mozley was put on the A. list of contributories. Mozley executed a deed of inspectorship under s. 192 of the Bankruptcy Act, 1861, in October, 1866, and the defendant also executed a similar deed, which was registered on the 29th of December, 1867. On the 6th of December, 1867, the plaintiff and defendant were placed on the B. list of contributories; and in March, 1869, the defendant was ordered to pay a call of 40*l.* per share. The liquidator proved against the estate of Mozley, and he also proved against the estate of the defendant; in neither case was the debt paid, and he then came upon the plaintiff, who compromised the claim by the payment of 15*l.* per share in respect of these shares. The question is, whether he has a right to recover that 15*l.* against the defendant, who was a mesn transferee in the chain of transfers which have taken place with regard to these shares. The Court of Queen's Bench held that the plaintiff had such a right; and they held, further, that the

(1) 1 De G. J. & S. 330; 33 L. J. (Bkcy.) 14.

inspectorship deed executed by the defendant was no answer to this claim, it having been contended that this debt might have been proved by the plaintiff, and therefore was extinguished.

Now with regard to the second point, which is a short and easy one, it is enough to say, that it turns upon the words of 24 & 25 Vict. c. 134, s. 153; and it is admitted by Mr. Herschell that, unless *Re Moor* (1), decided by Lord Westbury on appeal, can be distinguished from this case, the statute has been interpreted in a way fatal to that contention. I am unable to distinguish this case, either in its facts or in its principles, from the case before Lord Westbury. The reasons of Lord Westbury's judgment and the interpretation which he put upon s. 153 appear to me to be right, proper, and sensible, and I have no difficulty in assenting to it. Therefore, upon the short ground that Lord Westbury has decided this point as a court of appeal, we affirm the judgment of the Queen's Bench, concurring entirely in the authority of *Re Moor*. (1)

As to the first point made by Mr. Herschell, whether, under the circumstances there is a liability on the part of the defendant to indemnify the plaintiff; there have been several cases decided on this matter. *Walker* v. *Bartlett* (2) was a case decided in this Court; and if the facts had been exactly the same, it would have been difficult for Mr. Herschell to have contended against the authority of that case, because, having been decided in this Court, it is binding on us. The facts of the case are stated by Wightman, J., who delivered the judgment of the Court: "The plaintiff was the owner of 500 shares in a mine worked by a company, on what is called the cost book principle, according to certain regulations which subjected the person registered as the owner of the shares in the cost book to the payment of calls in respect of such shares as long as he continued registered in the book as the owner. The plaintiff, in pursuance of an agreement between him and the defendant, sold his shares to the latter, and delivered to him a document addressed to the secretary of the mine, by which the plaintiff requested him to enter a transfer of the shares and all profit arising therefrom out of his name into that of the transferee, subject to the

(1) 1 De G. J. & S. 330; 33 L. J. (Bkcy.) 14.

(2) 18 C. B. 845; 25 L. J. (C.P.) 263.

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rules under which the plaintiff held them, but leaving a blank for the name of the transferee to be filled up by the holder of the document, which also contained at the foot an agreement to take and accept the shares subject to the rules, with the name of the party agreeing also left in blank. . . . The plaintiff, by the delivery of that document to the defendant, had done all that it was incumbent upon him to do, or that he could do, to pass the property in the shares to the defendant, who, upon the receipt of it, became potentially the owner of the shares, and might have made his title perfect at any time. The defendant, however, did not cause the shares to be registered in his name; and the plaintiff was, in consequence of his name being continued on the register, obliged to pay some subsequent calls; and the question before us was, whether the defendant was, under the circumstances of the case, bound to cause the shares to be registered in his own name, or if he did not, whether there was an implied contract of indemnity by him to the plaintiff." On the first point, the Court say there was no obligation on the part of the defendant to cause the shares to be registered in his own name as owner: "The second point then arises, whether, if the defendant does not choose to avail himself of that power, which for his benefit and convenience is made optional with him and not with the plaintiff, there is not an implied contract on his part to indemnify the plaintiff against the consequences of his (the defendant's) suffering the plaintiff's name to be continued on the register after he has done all that the nature of the contract between him and the defendant, and of the property which was the subject of it, would require him to do to convey a perfect title to the defendant." And under those circumstances the Court of Exchequer Chamber held that that implied contract did arise, and that the defendant was bound to indemnify the plaintiff; and they distinguished the case of *Humble* v. *Langston* (1), of which I will say nothing in the present case; they adopt the principle which was laid down in *Burnett* v. *Lynch* (2); and they in effect say, that where there was an absolute parting with the shares the transferor gets rid of his shares and the transferee accepts the shares cum onere, and undertakes to discharge all liability which may arise in respect of them. That

(1) 7 M. & W. 517. (2) 5 B. & C. 589.

was the case of *Walker* v. *Bartlett* (1), which is not exactly in point, because it did not arise on the Companies Act, 1862, and in that case there was no bankruptcy of the transferee, and there are many circumstances in this case which did not arise in that; but in principle it must be considered to carry the decision which we are about to come to. It was pointed out in the course of the argument by my Brother Denman, that in the judgment of this Court in *Maxted* v. *Paine* (2), this Court assumed the doctrine which is now disputed, viz. that, upon a transfer of this description of shares there is an implied contract on the part of the transferee to indemnify the transferor from any calls or liability which may arise in respect of the shares during the time the transferee holds them. There are also other cases on which the Court below proceeded. *Ex parte Nevill* (3) was adopted expressly, as far as the reasoning of Lord Justice James was concerned, by Willes, J., in giving judgment in *Roberts* v. *Crowe* (4), and was scarcely denied by Mr. Herschell to be an authority against the defendant. The decision of the Court of Queen's Bench in the present case is based upon the broad principle that a person who takes the advantage must take the disadvantage, if any there be, with which that benefit is accompanied. But it has been attempted to distinguish this case from the other cases upon this ground: that in this case the liability which is sought to be enforced upon the transferee is a liability which does not result from the default of the transferee, but is a liability imposed by the Act of Parliament only in case of inability to pay on the part of the present shareholder, Mozley. I understood Mr. Herschell to argue that the principle which might apply in the ordinary case of transferor and transferee had no application where the liability, on such an inability to pay as was the foundation of the liability in this case, was created by Act of Parliament. There is also, no doubt a distinction which was hinted at by him, but not much insisted on, that the liquidator, having failed to get the whole which the company was entitled to from the ultimate shareholders, Class A., is not bound to sue the contributories in Class B. in their order of date; that he is not

(1) 18 C. B. 845; 25 L. J. (C.P.) 263.

(2) Law Rep. 6 Ex. at p. 134

(3) Law Rep. 6 Ch. 43.

(4) Law Rep. 7 C. P. 629

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bound to begin within the last transferor, and then go upwards to the original transferor; but that Class A., being one class of shareholders, if any shareholder in Class A. fails, then recourse may be had to Class B., not one by one, step by step, but to Class B. as a whole. There is no doubt, as matter of fact, that the liquidator may go to the mesne transferors of shares in Class B. to secure payment from them, and get, if he can, the whole that is due to the company out of any one of them. There is no doubt that that is so in point of fact and law; but that does not appear to me to vary the responsibility which the transferees and transferors respectively have, the one to the other, arising out of the relation which is created between them upon the various contracts which are made by the one with the other. I apprehend the rule of law to be that, if there should be twenty mesne transferors between the first holder and the last holder, who are all liable because they have been holders of the shares within the year, if the company choose to demand payment of any one of them, he would be bound to pay, and would have a right to come on his immediate transferee and say, "As between you and me, when I parted with the shares to you, the implied contract was, that you would discharge in respect of them all liability that might arise during the time of your holding. This is a liability which arose during the time you held the shares, though the call was not made till after you had parted with them. You may have some further remedy against somebody else, but as between you and me that was the contract. I have had to pay, and you must repay me." That seems to me to be the short and simple ground on which this case may be decided, and that is the ground on which the Court of Queen's Bench based their judgment. I think that they are right, and that upon both points the judgment below ought to be affirmed.

BRAMWELL, PIGOTT, and CLEASBY, BB., and GROVE and DENMAN, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Rawle.*
Attorneys for defendant: *Elmslie, Forsyth, & Sedgwick.*

WALL *v.* THE CITY OF LONDON REAL PROPERTY COMPANY, LIMITED.

1874
Feb. 16.

Agreement to grant Use of an Entrance to Premises—Defective Title—Measure of Damages for Breach of Contract.

By an agreement, dated the 6th of September, 1871, entered into between the plaintiff and defendants, it appeared that the plaintiff was entitled to the residue of a lease for twenty-seven years, from 1857, of the Bell Inn, situate in Bell Yard, part of which had been underlet; that the defendants had become assignees of the underlease, and also of a term for 150 years, being the reversion immediately expectant on the lease of the Bell Inn, vested in the plaintiff; that the defendants had contracted for the purchase of the freehold of the Bell Inn, together with other premises situate in the Bell Yard, and that the same would shortly be conveyed to them in fee simple; and that for the purpose of enabling the defendants to make alterations both in the Bell Inn and in the other premises contracted to be sold to them, it had been agreed that the plaintiff should surrender part of the premises in the lease; and it was agreed that the defendants should forthwith grant to the plaintiff for the term, the use and enjoyment of an entrance to the Bell Inn from St. Michael's Alley. The agreement then contained stipulations that the plaintiff should surrender part of his leasehold interest in the Bell Inn, and that the defendants should make alterations described in the agreement, and amongst others, that they should remove a portion of the existing building between St. Michael's Alley and the Bell Inn, and make an entrance to the Bell Inn 4 ft. wide, and grant to the plaintiff the use of the entrance during the residue of the term for which he held the Bell Inn; and it was also agreed that the defendants should, within a limited time, complete the alterations and execute a lease at a peppercorn rent to the plaintiff of the premises and the entrance; for a term of years co-extensive with the term for which he held the Bell Inn, containing covenants similar to those contained in his present lease. One of those covenants was a covenant by the lessor that the lessee should quietly enjoy the premises without disturbance from the lessor or those claiming under him. The entrance in question was on premises contracted to be purchased by the defendants, and forms no part of the Bell Inn. The plaintiff surrendered his part of the premises, and the defendants erected other buildings in their place, and derived permanent benefit from the agreement. They also made the entrance, and put the plaintiff in possession of it; but the day after it was stopped up by third parties. The entrance had been conveyed to those third parties by one S., who was not a person claiming through the defendants. No lease had been executed. An action having been brought for not granting the use of the entrance:—

Held, that the rule in *Flureau* v. *Thornhill* (2 W. Bl. 1078) did not apply, and that the plaintiff was entitled to such damages as would amount to the difference between the present state of things and what it would have been if the contract had been performed and the plaintiff had got a title to the entrance.

CASE stated by an arbitrator under an order at Nisi Prius.

The action was brought upon an agreement, dated the 6th of

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September, 1871, and the breaches alleged (so far as they are material to this case) are that the defendants did not make an entrance to the Bell Tavern from St. Michael's Alley, 4 ft. wide, nor grant to the plaintiff the use of the entrance from St. Michael's Alley at all times during the residue of the term for which the plaintiff was possessed of the Bell Tavern, nor execute a lease at the expense of the defendants of (inter alia) the entrance to the Bell Tavern to the plaintiff. The plaintiff claimed as special damage that he had been unable to obtain an entrance to a luncheon bar which he had erected, and had been unable to use the luncheon bar, and had thereby lost the money expended by him in the building, construction, and fitting up of the luncheon bar, and had lost other large sums of money and profits which he would have derived from the use thereof.

The defendants pleaded a denial of the agreement and a denial of the breaches.

The facts of the case and the arguments sufficiently appear in the judgment.

Jan. 20. *Brown, Q.C.* (*Ledgard* with him), for the plaintiff, cited the following cases: *Lock* v. *Furze* (1); *Mattock* v. *Kinglake* (2); *Roper* v. *Coombes* (3); *Souter* v. *Drake* (4); *De Medina* v. *Norman* (5); *Stranks* v. *St. John* (6); Sug. V. & P. p. 573.

W. Williams, Q.C. (*C. Bowen* with him), for the defendant, cited *Bandy* v. *Cartwright* (7); *Church* v. *Brown* (8); *Pounsett* v. *Fuller*. (9)

Cur. adv. vult.

Feb. 16. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

BLACKBURN, J. The answers to the questions in this case depend upon the true construction of a very special agreement made between the parties on the 6th of September, 1871. By the re-

(1) Law Rep. 1 C. P. 441.
(2) 10 A. & E. 50.
(3) 6 B. & C. 534.
(4) 5 B. & Ad. 992.
(5) 9 M. & W. 820.
(6) Law Rep. 2 C. P. 376.
(7) 8 Ex. 913; 22 L. J. (Ex.) 285.
(8) 15 Ves. 258.
(9) 17 C. B. 660; 25 L. J. (C.P.) 145.

citals in that agreement it appears that the plaintiff was entitled to the residue of a lease for twenty-seven years, from 1857, of the Bell Inn, situate in Bell Yard, part of which had been underlet; that the defendants had become assignees of the underlease, and also of a term for 150 years, being the reversion immediately expectant on the lease of the Bell Inn vested in the plaintiff. There is then a recital that the defendants had contracted for the purchase of the freehold of the Bell Inn, together with other premises situate in the Bell Yard, and that the same would shortly be conveyed to them in fee simple; and that, for the purpose of enabling the defendants to make alterations both in the Bell Inn and in the other premises contracted to be sold to them, it had been agreed that the plaintiff should surrender part of the premises in his lease, and that the agreements should be entered into thereafter expressed.

The operative part of the agreement, as far as material, is that it is agreed that the defendants should forthwith give and grant to the plaintiff for the term thereinafter mentioned, inter alia, the use and enjoyment of an entrance to the Bell from St. Michael's Alley, as shewn upon the plan attached to the agreement.

This entrance is on the premises contracted to be purchased by the defendants, and forms no part of the Bell Inn.

There are then stipulations that the plaintiff shall surrender part of his leasehold interest in the Bell Inn, and that the defendants shall make alterations described in the agreement; and, amongst others, that the defendants shall remove a portion of the existing building between St. Michael's Alley and the Bell, and make an entrance to the Bell four feet wide, and shall grant to the plaintiff the use of the said entrance at all times during the residue of the term for which he holds the Bell, subject to certain provisions. Then follows an agreement that the defendants shall complete part of the alterations within six months, and shall, within eight months, execute a lease at a peppercorn rent to the plaintiff of these and, inter alia, the entrance aforesaid for a term of years co-extensive with the term for which he held the Bell, and containing covenants and conditions similar to those contained in his present lease. One of the covenants in that lease is a covenant by the lessor that the lessee shall quietly enjoy the

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premises without disturbance from the lessor or those claiming under him.

Such being the agreement, it appears that the plaintiff did surrender the part of his premises, that the defendants pulled them down and erected other buildings in their place, and have, as the case finds, derived substantial and permanent benefit from the agreement. They also completed the alterations, and in fact removed the part of the buildings between the Bell Inn and St. Michael's Alley, and made the entrance four feet wide, as stipulated for, and put the plaintiff in possession of it; but the day after they had done so the rector and churchwardens stopped up the entrance.

It is found as a fact that the rector and churchwardens were owners in fee of so much of the entrance as to make the residue of no practical use. It is stated that this portion of the entrance had been conveyed to the rector and churchwardens by Mr. Arthur Saltmarsh in fee by a deed dated the 1st of August, 1857. It is not expressly stated, but we may intend that Saltmarsh was one of those through whom the persons who had contracted to sell the adjoining premises to the defendants made title. He certainly was not a person claiming through the defendants. It is expressly found in the case that the defendants bonâ fide believed that they had title to do all that they promised to do, that they had no notice of the conveyance by Saltmarsh, and that no negligence or want of due care can be imputed to the defendants.

No lease has been executed.

Under these circumstances the questions asked in the case are:—

1st. Whether the plaintiff is entitled to nominal damages only.

2nd. On what principle the damages are to be assessed.

It is not necessary to wait for the decision of the House of Lords in *Bain* v. *Fothergill*, now standing for judgment in that House, as we think that the rule in *Flureau* v. *Thornhill* (1) cannot possibly apply to a case like the present, where it appears on the face of the agreement that the defendants had not yet got any title, and that no abstract of title was to be waited for, but that the plaintiff was forthwith to execute his part of the agreement, and it appears did in fact execute it in a way that can never be

(1) 2 W. Bl. 1078.

undone, and which, as it is found, has conferred on the defendants substantial and permanent benefit.

And this was scarcely contested on the argument. A more plausible point was made on account of the terms of the covenants in the lease which the defendants were to grant to the plaintiff. And it was argued that the promise, as to the defendants' title and power to grant, to be implied from the agreement to grant the plaintiff this entrance, must be cut down to a promise to the same limited extent as that in the lease. We do not, however, think that we ought to put this construction on the agreement. It appears on the face of the agreement that at the time when the defendants agreed forthwith to give and grant to the plaintiff the use and enjoyment of the entrance, they were purchasers who expected to have a title conveyed to them, but had not yet got it; and the plaintiff was, in consideration of this grant, immediately, and without waiting to see what title they should get, to give up his property. It is impossible to suppose that the plaintiff intended to part with it merely for a promise that the defendants should hereafter grant him this entrance if they should succeed in getting title thereto, and that, if they could not, he was to have nothing. We think that we may well hold that the true meaning of this particular agreement is, that the promise as between the plaintiff and defendants was absolute, but that the covenant to be inserted in the lease, which would run with the land and regulate the rights of the assignees of the lease, was to be restricted.

We answer the first question by saying that the plaintiff is not confined to nominal damages only. To the second we answer that the arbitrator must apply the general rule of common law, and ascertain as well as he can what the pecuniary amount is of the difference between the present state of things and what it would have been if the contract had been performed and the plaintiff had got a title to this entrance.

The various matters mentioned in the case are all material in estimating what that difference is, but do not in themselves form the measure of it.

Judgment for the plaintiff.

Attorneys for plaintiff: *Symes, Sandilands, & Humphry.*
Attorneys for defendants: *Tathams, Curling, Walls, & Pym.*

1874
Jan. 24.

MAUND, APPELLANT; MASON, RESPONDENT.

Poor Law—43 *Eliz. c.* 2, *s.* 7—"*Children*"—*Non-liability of Grandchild to maintain Grandfather.*

By 43 Eliz. c. 2, s. 7, the father and grandfather, and the mother and grandmother, and the children of every poor . . . person, . . . being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person:—

Held, that the word "children" does not include grandchildren; and that a grandchild is not liable for the maintenance of his grandfather.

CASE stated by justices of the city of Worcester, under 20 & 21 Vict. c. 43.

The respondent was summoned by the appellant before the justices, under s. 7 of 43 Eliz. c. 2, and charged that he, the respondent, being then a person of sufficient ability to support or relieve his grandfather Robert Gell, a poor person unable to work, and chargeable to the common fund of the Worcester Poor Law Union, did neglect and refuse so to do.

By 43 Eliz. c. 2, s. 7: "The father and grandfather and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person."

At the hearing the chargeability of the grandfather and the sufficiency of the ability of his grandson, the respondent, to relieve and maintain him were not disputed on the part of the respondent, but his liability as a grandchild was denied on the ground that "children" only were mentioned in the statute.

It was contended on the part of the appellant that the word children should be construed to mean and include a grandchild, and that the respondent should be accordingly held liable to relieve and maintain his grandfather.

The justices dismissed the summons, being of opinion that the statute did not create a liability upon grandchildren, and for the following reasons: First, that the statute specially enumerated the degrees of relationship which shall create a liability to relieve and maintain, amongst which grandchildren are not included.

Secondly, that if the legislature had intended to extend the liability to grandchildren, the words "and grandchildren" would have been added after the word "children." Thirdly, that as the statute imposes a substantial liability not imposed at common law, and in default of obeying an order creates a criminal liability also, they did not feel at liberty to construe its words to extend to a class of relations not made liable expressly or by necessary implication. Fourthly, that there is no latitude in the wording of the statute admitting the importation of a liability upon persons in any other degree of relationship than those enumerated.

Anstie, for the appellant. There is no direct authority that a grandchild is liable, under s. 7 of 43 Eliz. c. 2, to maintain his grandfather; but the dicta of the judges in *Walton* v. *Spark* (1) seem to shew that the word "children" in the statute is extended to grandchildren. Children have in the construction of wills been held to mean descendants, and the word "children" in s. 7 might well mean descendants.

[QUAIN, J. The 4 & 5 Will. 4, c. 76, s. 78, follows the language of the statute of Elizabeth. Although a grandfather must support his grandchildren, yet grandchildren are not liable to support their grandfathers.]

No doubt it has been held that a man is not liable for the maintenance of collateral relations; neither does the enactment relate to relations by marriage: *Rex* v. *Munden* (2); *Rex* v. *Dempson* (3); *Cooper* v. *Martin*. (4)

[BLACKBURN, J. Do not all those cases shew that the words of the statute are to be construed according to their natural meaning?]

Bosanquet, for the respondent, was not heard.

BLACKBURN, J. The word "children" in s. 7 of 43 Eliz. c. 2, means children, and we cannot extend its meaning.

QUAIN, J. The 59 Geo. 3 c. 12, s. 26, which empowers justices

(1) Comb. 320; Skin. 556; Holt, 571.
(2) 1 Str. 190.
(3) 2 Str. 955.
(4) 4 East, 76.

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in petty sessions to order relief in the same manner as justices in quarter sessions, follows the exact words of 43 Eliz. c. 2. Those words must receive their natural meaning.

ARCHIBALD, J., concurred.

Judgment for the respondent.

Attorneys for appellant: *Prior, Bigg, & Co.*
Attorney for respondent: *J. Needham.*

Jan. 26.

EX PARTE BIRKBECK.

Municipal Corporation—Alderman—Disqualification—Time for applying for Quo Warranto—5 & 6 Wm. 4, c. 76, ss. 25, 28—7 Wm. 4 & 1 Vict. c. 78, s. 23.

By 5 & 6 Wm. 4, c. 76, ss. 25, 28, no person shall be qualified to be elected or to be an alderman of any borough who shall not be entitled to be on the burgess list. By 32 & 33 Vict. c. 55, s. 1, every person who on the last day of July in any year shall have occupied any house, warehouse, &c., in any borough for the whole of the preceding twelve months shall, if duly enrolled, be a burgess of the borough. By 7 Wm. 4 & 1 Vict. c. 78, s. 23, every application to the Court of Queen's Bench, calling upon any person to shew by what warrant he claims to exercise a corporate office shall be made before the end of twelve months after the time when the person shall have become disqualified.

S. was elected in 1868 an alderman of a borough, being then on and entitled to be on the burgess roll. In October, 1873, he was struck off the new burgess list, having ceased to occupy the qualifying premises many months before. On the 6th of January, 1874, he acted as alderman, and on the 26th of January application was made for a quo warranto:—

Held, that S. became disqualified when he ceased to occupy (which was conceded to be more than twelve months ago), and so ceased to be entitled to be on the burgess list, and that the application was, therefore, too late.

MOTION on behalf of C. H. Birkbeck, for a rule calling upon A. C. Sheriff to shew cause why an information in the nature of a quo warranto should not issue calling upon him to shew by what right he claimed to exercise the office of an alderman of the city of Worcester.

It appeared from the affidavits that Sheriff was elected an alderman on the 9th of November, 1868, being then on, and entitled to be on, the burgess roll. At the revision on the 2nd of October, 1873, Sheriff was struck off the burgess list, on the ground that

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he had not on the last day of July, 1873, occupied a house or other premises during the whole preceding twelve months, as required by 32 & 33 Vict. c. 55, s. 1; and it appeared that, on inquiry in September, 1873, though he was still rated for the qualifying premises, it was ascertained that he had given them up many months before. Sheriff had not acted as alderman since his disqualification had become known until the 6th of January, 1874, when he attended a meeting and claimed to act as alderman, and voted as such.

Jelf, in support of the motion, contended that, although it must be admitted that Sheriff ceased to occupy more than twelve months from the present time, still the disqualification did not arise till he was struck off the burgess list in October; or at any rate that the disqualification continued de die in diem.

BLACKBURN, J. There must be no rule. Sheriff ceased to be entitled to be on the burgess list more than twelve months ago; and by s. 23 of 7 Wm. 4 & 1 Vict. c. 78, every application to this Court for a quo warranto as to a corporate office must be made "before the end of twelve calendar months after the election, or the time when the person shall have become disqualified." It is more than twelve months after Sheriff ceased to occupy the premises, though this was only known in September or October, on his being struck off the new burgess list. But the qualification of an alderman (under ss. 25 and 28 of 5 & 6 Wm. 4, c. 76) is not the being on the burgess roll, but the being entitled to be on the burgess list. It is said that there is a fresh disqualification every day he remains without being on the roll. That might possibly be so if the qualification were that he should be on the roll. This statute of limitations was passed to quiet possession, and there can be no rule; but the party may still run the risk of penalties if he acts while disqualified.

QUAIN and ARCHIBALD, JJ., concurred.

Rule refused.

Attorney for applicant: *G. A. Hall, for A. W. Knott, Worcester.*

1874
Jan. 30.

THE QUEEN *v.* FARQUHAR AND OTHERS, JUSTICES OF MONMOUTHSHIRE.

Beer-house—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Renewal of Licence—Proceedings where no Notice of Opposition.*

By 35 & 36 Vict. c. 94, s. 42, when a licensed person applies for a renewal of a licence he need not attend in person at the licensing meeting, unless requested by the justices to do so. The justices shall not entertain any objection to the renewal of the licence unless seven days notice of intention to oppose has been given to the holder; provided that the justices may, notwithstanding no notice has been given, on an objection being made, adjourn the granting of the licence to a future day and require the attendance of the holder on that day, when the case will be heard and the objection considered as if the prescribed notice had been given.

G. applied for a renewal of a licence to sell beer, by retail, to be drunk on the premises, and attended at the general licensing meeting in August, 1873, having received no notice of opposition, and not having been required to attend by the justices. He paid the fees to the justices' clerk, who said "all right," on which G. left, supposing his licence would be renewed. The justices had by themselves considered the various applications for renewal, and had determined to adjourn eleven cases, amongst which was G.'s, for the purpose of satisfying themselves of the value; and they gave notice in open court that the eleven cases would be adjourned to the 24th of September, but knowledge of this was not brought home to G. On the 24th of September, G. not being present, the justices refused to renew his licence on the ground that the premises were not of the requisite value. G. then applied for a mandamus to the justices to grant him a licence:—

Held, that he was not entitled to the mandamus, as prayed; but that the justices were bound to have given him notice, and required his attendance at the adjourned meeting, and that a mandamus must be granted to hold an adjourned licensing meeting and, after notice to G., to hear and determine his application.

Semble, that any one of the licensing justices could himself make an objection to the renewal of a licence.

RULE calling on the Rev. James Farquhar and others, justices of Monmouthshire, acting for the Abergavenny division, to shew cause why a writ of mandamus should not issue commanding them to hold, within a reasonable time, an adjournment of the general annual licensing meeting for the said division, holden on the 27th of August, 1873, and at such meeting to grant to Thomas Gardner a certificate for the renewal of a licence to sell beer, &c., by retail, to be consumed on the premises, in a house called the Tanner's Arms, in the town of Abergavenny.

It appeared from the affidavit on which the rule was obtained, that Gardner obtained a licence in 1869, which had been continued up to the year 1873; Gardner having applied for a renewal, attended at the licensing meeting in August, 1873, and paid the fees to the clerk to the justices, who said "all right," which he understood to mean that his licence would be renewed, and he left the meeting at once. He was afterwards informed that the justices, at an adjourned meeting in September, had refused to grant him a certificate, on the ground that they considered the house not of sufficient value. Gardner had not been required to attend at the original or adjourned meeting, and no written notice of objection to the renewal had been served upon him.

The affidavits in reply stated, that at the licensing meeting in 1872, the justices had publicly announced that at the meeting in 1873 beer-house licences would not be renewed if the houses were not then of the value required by the statute. At the meeting in August, 1873, the justices, before the business commenced, had examined into the value of the different houses, and determined to adjourn the cases of eleven houses, amongst which was the Tanner's Arms, to enable the justices to satisfy themselves of the correct value of each of the houses; and the chairman announced in court that the eleven cases would be adjourned till the 24th of September. The justices themselves afterwards inspected the different houses, and at the adjourned meeting refused the licence to the Tanner's Arms, on the ground that it was not of the annual value of 11*l.* as required by s. 1 of 3 & 4 Vict. c. 61, and ss. 46 and 47, of 35 & 36 Vict. c. 94, Abergavenny being a town containing more than 2500 inhabitants.

Notice of appeal to the Quarter Sessions was given, but the appeal had not been prosecuted.

Bosanquet shewed cause. By ss. 44, 46, and 47 of 35 & 36 Vict. c. 94, licences are now not to be granted unless the house is of the required real annual value. The justices were therefore right, assuming Gardner's house not to be of the value of 11*l.*; and it was his own fault that he did not attend, as public notice was given that the case of his house, amongst others, was adjourned to the 24th of September.

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[BLACKBURN, J. By s. 42 (1) primâ facie the renewal ought not to have been refused unless seven days notice of objection had been given; but if no such notice has been given, on objection being made, the justices may adjourn to a future day; but then they must require the attendance of the holder of the licence on that day.]

That was in effect done here. It was competent to any justice to object from his own knowledge.

[BLACKBURN, J. Very possibly; but then the applicant was not required to attend. A general notice not brought home to his knowledge is not sufficient. He has not been heard, which he was entitled to be. The mandamus must be to hear and determine only, but not to grant a renewal.]

Had the rule been for a mandamus in that form the justices would scarcely have shewn cause. There is a further objection—that the applicant had a right of appeal, and indeed he gave notice of appeal. As he had this remedy by appeal, the Court will not assist him by mandamus: *Reg.* v. *Smith.* (2)

[BLACKBURN, J. There the applicant had been heard by the justices; here he has not been heard at all.]

T. Atkinson, in support of the rule. In the case of an old licence, under s. 42 the renewal can only be refused on seven days notice, or on objection and adjournment, and then the applicant is to be required to attend. Here there was no notice and no objection, except that of the justices themselves; and Gardner had no notice

(1) 35 & 36 Vict. c. 94, s. 42: "Where a licensed person applies for the renewal of his licence, the following provisions shall have effect: (1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend: (2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given: (3.) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. Subject as aforesaid, licences shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

(2) Law Rep. 8 Q. B. 146.

that he was required to attend. By the last paragraph of s. 42, "Subject as aforesaid, licences shall be renewed, &c.;" therefore, the justices not having proceeded "as aforesaid," it is now imperative upon them to grant a renewal, and the mandamus ought to go in the terms prayed.

BLACKBURN, J. This is a rule for a mandamus commanding the justices to hold an adjournment of the licensing meeting, and then to grant a renewal of Gardner's licence. It is clear we cannot grant a mandamus in that form. In the first place, the justices say that the house was not duly qualified, not being, in their opinion, of the annual value of 11*l.*; and though a house has been previously licensed as a beerhouse, yet if it is not of the real value now required, the holder of the licence would not be entitled to have it renewed, if the objection were properly raised and properly decided. The meaning of s. 42, paragraph 2, is obvious enough, the holder of a licence is to have notice before an objection to the renewal can be heard; but there might have been a failure to give the seven days notice, though the objection were good; in such case the justices may adjourn the granting of the licence to a future day, and require the attendance of the holder of the licence on such day when the case is to be heard and the objection considered, as if due notice had been given. Upon that, in the present instance, assuming that the justices might of their own knowledge make the objection themselves, and I do not say that is not impossible that they might, yet it is clear that they ought not to have decided at once, because no notice had been given to the applicant, and he was entitled to be heard; but they might have adjourned the hearing. The justices announced in open court that the cases of eleven houses were adjourned, but that cannot be taken to have been formal notice to the applicant, who swears that he left the meeting believing his licence would be renewed; and by having failed to give formal notice to the applicant to attend at the adjournment, they have made a mistake, and have decided without hearing him; they must, therefore, hear him. Mr. Atkinson says that, by the last clause of s. 42, "Subject as aforesaid, licences shall be renewed, &c.," and the justices, not having proceeded under that section, are now bound to grant the renewal,

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although the objection as to want of value be good; that cannot be so. All we can do is to grant a mandamus to the justices to hold a licensing meeting to hear and consider the objection to the renewal on notice to the applicant, and to decide, after hearing him, according to law and fact. We have power to order the justices to do this now, though the proper time has gone by, on the authority of the decision of the Exchequer Chamber in *Mayor of Rochester* v. *Reg.* (1) The rule, therefore, will be absolute for a mandamus commanding the licensing justices, or some of them, to hold a meeting, with notice to the applicant, and then to hear and determine the question of the renewal of his licence.

QUAIN, J. I am of the same opinion. I do not think that because a mistake has been made by the justices the applicant is entitled to a renewal of his licence without more. The intention of s. 42 is that there should be a due hearing, and it is only on the objection failing in point of law or on the facts that he is entitled to the renewal. But to say that merely because he has not been required to attend at the adjourned meeting, he is now to have a licence granted as of course, is a proposition quite unmaintainable. The mandamus must be to the justices to assemble a meeting for the purpose of hearing Gardner's application, they having given him notice to attend, and hearing the case just as they would had they proceeded regularly in the first instance under subs. 2 of s. 42.

ARCHIBALD, J. I am of the same opinion, it being understood that the mandamus is to be in the limited form to hear and determine only.

Rule absolute accordingly.

Attorney for applicant: *G. Price.*

Attorney for justices: *A. Scott Lawson, for W. F. Batt, Abergavenny.*

(1) E. B. & E. 1024; 27 L. J. (Q.B.) 434.

SNEESBY *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

1874
Feb. 3.

Railway Company—Negligence—Consequential Damages.

A herd of plaintiff's beasts were being driven, at 11 o'clock p.m., along an occupation road to some fields. The road crossed a siding of the defendants' railway on a level, and while the cattle were crossing the siding the defendants' servants negligently sent some trucks down an incline into the siding, which divided the cattle into two lots, and frightened them, and they rushed away with the drovers after them. The drovers succeeded in recovering most of the cattle, but they were unable to recover six of them, which were ultimately found at between 3 and 4 a.m. lying dead or dying on another part of the railway; and it appeared that they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fences, and so on to the line. There was no evidence as to when the train had passed which ran over the cattle:—

Held, that, it being admitted that the defendants had been guilty of negligence which caused the drovers to lose control over the cattle, and it being also admitted that the plaintiff's men had done all they could to recover control over the beasts and had not been able to do so before they were killed, their death was the consequence of the defendants' negligence; and the damage was not too remote.

DECLARATION, that defendants were possessed of a railway and sidings, and of trucks for the conveyance of goods on the railway, that the sidings crossed an occupation road on a level, and the defendants so carelessly and negligently managed their railway, sidings, and trucks that the trucks were suddenly driven down upon and against certain cattle of the plaintiff while they were lawfully passing over the crossing along the occupation road, without any warning having been given by the defendants' servants to the persons in charge of the cattle, whereby some of the cattle were divided from the persons in charge of them, and were frightened and escaped on to another part of the railway and were killed by a passing train, and others of the cattle, being so frightened and divided from the persons in charge, ran along the occupation road to a place where the fences dividing the road from the railway were imperfect, and escaped through another fence on to the railway and were killed by a passing train.

Second count, that defendants were possessed of a railway, and were subject to the provisions of the Railway Clauses Consolidation

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SNEESBY v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

Act, and certain cattle of plaintiff were lawfully passing along an occupation road adjoining certain land taken for the use of the railway, and it was the duty of defendants to maintain a good and sufficient fence between the roads and the land so taken, yet defendants, neglecting their duty, maintained so insufficient a fence that plaintiff's cattle escaped on to the railway through the said fence, and were killed by a passing train.

Pleas: 1. Not guilty. 2. That the cattle were not plaintiff's as alleged. 3. To second count, that the cattle were not lawfully passing over the crossing. 4. To second count, that the cattle were not lawfully passing along the occupation road as alleged. 5. To second count, that the defendants were not subject as to the said railway to the Railways Clauses Consolidation Act.

Issue joined.

At the trial before the late Chief Justice Bovill, at the Leeds Spring Assizes, 1873, the following facts were admitted: The plaintiff, a cattle dealer, had sent a drove of twenty-nine fat beasts by railway for the Wakefield Wednesday market; on their arrival at Wakefield the night before, they were driven, about 11 p.m., along an occupation road to a field where they were to be kept ready for the market; the road crosses some sidings of the defendants' railway on a level, and while the cattle were crossing the sidings the defendants' servants negligently, and without any warning to the persons in charge of the cattle, let some trucks run violently down an incline into the sidings; this separated the cattle into two divisions and so frightened them that they escaped from the control of the drovers and rushed away. The drovers went after them, and succeeded in recovering most of the cattle; but six or seven of them were not found till between 3 and 4 a.m., when they were found lying dead or dying on another part of the defendants' railway, having been run over by a train. Their tracks were traced from the sidings; and it appeared that they had gone along the occupation road about a quarter of a mile, and had then got into an orchard and garden belonging to the defendants, the fences of which were in a defective state, and thence on to the railway where they were found. There was no evidence as to what time the train which had run over the cattle had passed.

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On these facts the learned judge directed a nonsuit, with leave to move to enter a verdict for the plaintiff for 153*l.* 13*s.*; the Court to draw inferences of fact.

A rule was obtained accordingly, on the grounds that the defendants were guilty of negligence, and also of a breach of duty in respect of the fences; and were liable for the death and injury to the cattle.

Price, Q.C., and *Beasley*, shewed cause. First, the death of the cattle was attributable to the defect of the fences. But the defendants were not bound to keep up the fences as against the plaintiff's cattle, first, because the Railways Clauses Act was passed after the defendants' special Act; secondly, because, if s. 68 does apply, they were not occupiers of the garden and orchard, and moreover the defendants were not bound to keep up the fences as against the public: *Manchester and Sheffield Ry. Co.* v. *Wallis* (1); *Dawson* v. *Midland Ry. Co.* (2)

[QUAIN, J., referred to *Rooth* v. *Wilson* (3) and *Ellis* v. *London and South-Western Ry. Co.* (4)]

Secondly, the defect of the fences was the proximate cause of the damage, and the damage was too remote from the defendants' negligence. There was a considerable lapse of time between the time when the cattle were frightened and when they were run over.

[BLACKBURN, J. There was no evidence as to when the train passed which did the mischief. However, on the facts as left for us, we must take it that there was no negligence on the part of the drovers in looking after and endeavouring to recover the cattle. This is the case of a tort, but it is somewhat analogous to the case of insurance; and where a ship is taken out of the control of the crew by a peril insured against, and is afterwards destroyed by another cause, still there is a total loss for which the underwriter is liable. The loss here is the same as if the cattle had fallen into an unfenced quarry.]

Lawrence v. *Jenkins* (5) will, no doubt, be relied upon by the

(1) 14 C. B. 213; 23 L. J. (C.P.) 85.
(2) Law Rep. 8 Ex. 8.
(3) 1 B. & Ald. 59.
(4) 2 H. & N. 424; 26 L. J. (Ex.) 349.
(5) Law Rep. 8 Q. B. 274.

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plaintiff; but in that case and the cases cited in it, the death of the cattle was directly attributable to the negligence in not keeping up the fence.

Field, Q.C. (*J. W. Mellor* with him), in support of the rule. If it be admitted that the plaintiff's drovers used due diligence in endeavouring to recover the cattle, and could not do so before the accident happened to them, the case is really not arguable: for then the negligence of the defendants' servants was the proximate cause, and the damage the natural result of the cattle being frightened. In addition to *Lawrence* v. *Jenkins* (1) and the other cases already referred to, *Anonymous* (2), *Powell* v. *Salisbury* (3), *Lee* v. *Riley* (4), and *Hill* v. *New River Co.* (5) may be cited. The last case is directly in point. There the defendants negligently allowed an escape of water, which frightened the plaintiff's horses, so that they started on one side and upset the plaintiff's carriage into a ditch which had been negligently left unfenced by a third person; and it was held that the defendants' negligence was the proximate cause of the damage. But, secondly, the defendants were liable, under s. 68 of 8 Vict. c. 20, for not keeping up the fence of the orchard and garden. [He was then stopped by the Court.]

BLACKBURN, J. I am of opinion that the rule must be made absolute. The facts seem to be that, by what is admitted to have been negligence on the part of the servants of the company, the cattle of the plaintiff, as they were crossing the railway on the level, were frightened and scattered, so that for a time the plaintiff's drovers lost control of all of them; they recovered the chief part of the cattle, but some were found killed on another railway. It happens that this was also the defendants' railway; and it appears that the cattle got on to the railway through a defect in the fence of a garden or orchard belonging to the defendants; but from the nature of the accident it seems to me that we may treat the case as if it had been the railway of some other company, or as if the cattle had fallen down an unguarded

(1) Law Rep. 8 Q. B. 274.
(2) 1 Vent. 264.
(3) 2 Y. & J. 391.
(4) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.
(5) 9 B. & S. 303.

quarry. The question is, are the defendants, whose negligence drove the cattle out of the custody of the plaintiff, liable for their death, or is the damage too remote? No doubt the rule of our law is that the immediate cause, the causa proxima, and not the remote cause, is to be looked at: for, as Lord Bacon says: "It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." (1) The rule is sometimes difficult to apply, but in a case like the present this much is clear, that so long as the want of control over the cattle remains without any fault of the owner, the causa proxima is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times a reclaimed falcon were frightened and escaped, the natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was that it would not be got back at all. So, if you have lost control of cattle and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them. It is the most natural consequence of cattle being frightened that they should go galloping about and get into a dangerous position, and, being in the neighbourhood of railways, should get on the line and be run over by a passing train, whether that of the defendants or not is immaterial. When once it is established that the cattle were driven out of the control of the plaintiff by the defendants' negligence and that the control could not be recovered till they were killed, which was the natural consequence of their being uncontrolled, the liability of the defendants is beyond dispute. *Lawrence* v. *Jenkins* (2) seems directly in point; the other cases when looked into do not go quite so far; but on principle there can be no doubt that the defendants are liable.

QUAIN, J. It is well established that a person is liable for all the consequences of his wrongful act: of which the well-known case of *Scott* v. *Shepherd* (3) is an instance; where a squib, having

(1) Bac. Max. Reg. 1. (2) Law Rep. 8 Q. B. 274.
(3) 2 W. Bl. 892; 1 Sm. L. C. 417.

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been thrown in a crowd, and having been hastily thrown away by two other persons, and ultimately injured the plaintiff, the wrong-doer, the original thrower, was held liable. So, where the plaintiff's cattle got through a defective hedge which the defendant was bound to keep in repair, and were killed, in one case by falling into a pit, and in another by the falling of a haystack upon them, the defendant was held liable. Here the defendants' porters, who were responsible for the proper management of the sidings and level crossing, are the persons doing the illegal act, the consequence of which was the escape and death of the cattle. In a case of contract the question is very different. In tort the defendant is liable for all the consequences of his illegal act where they are not so remote as to have no direct connection with the act, as by the lapse of time, for instance. Applying that to the present case, I think the damage to the cattle was not so remote from the injurious act as not to be the natural consequence of the act. The injurious act was the negligence of the defendants' servants in allowing trucks to be suddenly shunted across a level crossing at eleven o'clock at night without any warning, so that the plaintiff's cattle were frightened. The place was very dangerous from the numerous branch railways, and they, having escaped from the plaintiff's control, got on to one of the railways and were killed on the same night. These circumstances, I think, bring the case within the rule; and the death of the cattle was not so remote from the negligence of the defendants as to render the damages not recoverable.

ARCHIBALD, J. When the facts are understood, there can be no doubt as to the application of the rule that a wrong-doer is liable for all the consequences of his wrongful act. The defendants' servants had been guilty of a wrongful act, and the important fact (which, it appears, at the trial was conceded) is that, although all was done that could be done, it was impossible for the drovers to regain control of some of the cattle before they were killed. The natural consequence of the cattle being frightened was that they should stray, and, so straying in the neighbourhood of a railway, should get on to it, and so, lying down or remaining on it, should be run over by a passing train. Therefore all is referable, as the

proximate cause, to the original negligence of the defendants' servants.

Rule absolute.

Attorneys for plaintiff: *Clarke & Son, for Wainwright, Manchester.*

Attorneys for defendants: *Clarke, Woodcott, & Co., for Grundy & Co., Manchester.*

CAPE *v.* SCOTT AND ANOTHER.

Jan. 27.

Distress, Damage feasant—Common pur cause de vicinage.

The principle laid down in *Hall* v. *Harding* (4 Burr. 2426), that one commoner cannot distrain the cattle of another commoner because they come upon the commonable land by colour of right, applies to common pur cause de vicinage as well as to common appurtenant.

REPLEVIN for twenty sheep.

Avowry and cognizance, that the land on which the sheep were taken was a portion of the common and waste land of the manor of Caldbeck, in the county of Cumberland; and the defendant Scott avows, and the defendant Hudson acknowledges, the taking of the sheep, because, at the time when, &c., the defendant Scott was the possessor and occupier of certain lands and tenements in the manor and parish of Caldbeck: the occupiers whereof have for thirty years before this suit enjoyed as of right, and without interruption, common of pasture on the common or waste lands of the manor of Caldbeck for all their sheep and other commonable cattle levant and couchant upon their lands and tenements so in the possession and occupation of Scott at all times of the year, as to the lands and tenements of Scott appertaining; and because the sheep were wrongfully in and upon the common and waste lands of the manor of Caldbeck, depasturing and doing damage there, so that the defendant Scott could not enjoy his right of common as he otherwise could and might have done, the defendant Scott avows, and the defendant Hudson acknowledges, the taking of the sheep in the common or waste lands of the manor of Caldbeck, and justly, &c., as a distress for the damage.

Plea, that the land in the declaration mentioned was at the time

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when, &c., a common called Caldbeck Common, forming part of the common and waste lands of the manor of Caldbeck, and lay and from time immemorial had lain contiguous to a common called Uldale Common, forming part of the common and waste land of the manor of Uldale, and had never been divided or separated from the last-mentioned common by any hedge or fence whatsoever sufficient to prevent cattle from time to time feeding on either common going or escaping on to the other common; and that from time immemorial the cattle duly put on either of the commons in exercise of rights of common have gone and escaped, and been accustomed to go and escape, on to the other common, and there to intermix with and feed with the cattle from time to time feeding on such other common; and that the plaintiff is possessed of a messuage and lands in the parish of Uldale, the occupiers of which for thirty years before this suit enjoyed as of right and without interruption common of pasture over Uldale Common for all their cattle levant and couchant upon the land of the plaintiff, at all times of the year, as to the land of the plaintiff appertaining; and that, being in possession of such messuage and land, he put the sheep, being his own sheep, levant and couchant, upon the land of the plaintiff upon Uldale Common, in exercise of his right of common, and the sheep of the plaintiff afterwards of their own accord, and without the knowledge and consent of the plaintiff, went and escaped out of Uldale Common on to Caldbeck Common and intermixed and fed with the cattle then and there feeding on Caldbeck Common, and remained and continued on Caldbeck Common, on the occasion aforesaid, without the knowledge of the plaintiff, and there necessarily and unavoidably a little trod down and depastured, &c., and necessarily did damage as in the avowries and cognizances mentioned. (1)

New assignment, that the avowries and cognizances are not merely in respect of the matters and acts in the plea attempted to be justified, but also in respect of the sheep mentioned in the plea being more than were levant and couchant on the land of the plaintiff, and also in respect of the sheep put upon the common of Uldale by all the persons having rights of common of pasture thereon being more than the number of sheep proportionable to

(1) There were other pleadings raising the same point.

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the extent of the common of Uldale as compared with the common of Caldbeck, and also in respect of the plaintiff having committed acts mentioned in the avowries and cognizances to a greater extent and for other purposes than those mentioned in the plea and attempted to be justified.

Demurrer to the plea and to the new assignment, and joinder in demurrers.

Bompas, in support of the plea and demurrer to the new assignment. The main question raised on these demurrers is, whether where common pur cause de vicinage exists one commoner can distrain another commoner's cattle for a surcharge. It will scarcely be contended that in the case of common appurtenant, if the cattle are on the land under a colour of right, a commoner can take the law into his own hands and distrain the cattle. The only instance in which a commoner can distrain is, where the cattle of a stranger have either escaped or been driven on to the land subject to the right of common: *Morris's Case.* (1) When the common is surcharged, the proper remedy is by action: *Robert Marys' Case* (2), where it was decided that a commoner having a right of common may have an action on the case against a stranger for putting beasts on to the common, by which he cannot have his common of pasture in so beneficial a manner as before; and it is not necessary for the commoner who sues to shew whether the injury he complains of was or was not a surcharge by a fellow commoner: it is sufficient to allege that the defendant has turned his cattle on to the land, and thereby encroached on the plaintiff's right of common: *Atkinson* v. *Teesdale.* (3) In the judgment in that case (4) reference is made to a case decided in Hil. 5 Jac. C. B. rotulo 1427, in which Ingland, a commoner, had the like judgment where the verdict was found as in *Marys' Case,* and the cattle escaped, the defendant pretending to have common pur cause de vicinage. It is true that common of vicinage is not a right, it is but matter of excuse for a trespass: *Prichard* v. *Powell* (5); but this does not mean that it is not a privilege recognized by law. In *Ellis* v. *Rowles* (6) it was held, that if a commoner having a right

(1) Godbolt, 185.
(2) 9 Co. Rep. 111 *b.*
(3) 3 Wils. 278.
(4) 3 Wils. at p. 289.
(5) 10 Q. B. 589.
(6) Willes, 638.

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of common for one beast put on two, the lord can only distrain the one last put on. This shews that the power of distress even in the lord is limited.

[BLACKBURN, J. That case seems to be an authority to shew that the lord can in some cases distrain the commoners' cattle. On the other hand, in Gilbert on Distress, at p. 23, it is stated, "If a man who has a right of common upon the lord's waste for cattle, levant and couchant, on his land, surcharge the common, the lord for that cause cannot distrain; and where a man turns in his cattle under some colour of right of common, the lord cannot distrain." The authority for this position is an anonymous case in Wilson's Reports (1), where certain expressions of the judges are reported; they are merely dicta, but they are entitled to weight from being adopted in Gilbert.]

In *Hoddesdon* v. *Gresil* (2), the reason given why a commoner can distrain the cattle of a stranger is, that they come upon the land without colour of right; it follows from this, that although a commoner may surcharge, he has in every case a primâ facie right to have his cattle upon the land, and therefore that they cannot be distrained under any circumstances by a fellow commoner. In *Dixon* v. *James* (3), mentioned in the judgment in *Atkinson* v. *Teesdale* (4), it is laid down that one commoner cannot distrain the cattle of a fellow commoner, although he may distrain the cattle of a stranger. In Freeman's report it is said the question arose upon demurrer, but there is no judgment given: in Lutwyche it is said to have arisen in arrest of judgment, and again no decision was come to; but in the judgment of *Atkinson* v. *Teesdale* (4), it is stated, "and after verdict for the defendant the judgment was arrested because one commoner cannot distrain the cattle of another commoner, although he may distrain the cattle of a stranger."

[BLACKBURN, J. That is precisely a similar point to the question in *Hall* v. *Harding*. (5)]

It will be said, on the authority of *Corbet's Case* (6), that the number of cattle must be in proportion to the extent of the com-

(1) 3 Wils. 126.
(2) Yelv. 104.
(3) Freeman, 273, 2 Lutw. 1238.
(4) 3 Wils. at p. 291.
(5) 4 Burr. 2426.
(6) 7 Rep. 5 *a*.

monable land upon which they are turned. If this be so, the plea alleges that the cattle duly put on the common have escaped, &c.; this allegation will compel the plaintiff to prove that the right to the common has been enjoyed according to law, and as is said in the judgment in *Prichard* v. *Powell* (1), "all that is necessary for the pleading to shew is, that the cattle were lawfully on their own common before they strayed."

Crompton, contrà. The plea is bad. It consists of two parts; first, it sets up a prescriptive right between the commoners of Uldale and the commoners of Caldbeck; and secondly, it shews that the plaintiff has a right, under the Prescription Act, over the common of Uldale. The objection to the plea is that the prescriptive right between the two commons is not sufficiently and accurately set out.

[BLACKBURN, J. The plea alleges the cattle were "duly" put on the common. Such an objection might formerly be valid on special demurrer, but not now.]

The objection is one of substance. It is quite consistent with the plea that the plaintiff has only put the proper number of cattle on to Uldale Common; but that, owing to recent grants of common of pasture by the lord of the manor or by the overstocking of Uldale Common by other commoners, Uldale Common has been surcharged, and more cattle have been turned on to Uldale Common than it could support. If there were more cattle on Uldale Common than that common could support, and they strayed on to Caldbeck Common, the distress would be lawful, although the plaintiff had not exceeded the number of cattle which he was entitled to turn on.

[BLACKBURN, J. I cannot assent to that argument; it would be wrong to allow the plaintiff's cattle to be seized as a remedy for the encroachment of other commoners.]

The defendants were compelled to distrain, for they had no other remedy.

[BLACKBURN, J. This case is not distinguishable from *Hall* v. *Harding*. (2) Where cattle are on a common under a colour of right they cannot be distrained, at least, by a commoner; and when cattle are upon land subject to common pur cause de vicin-

(1) 10 Q. B. at p. 603.

(2) 4 Burr. 2426.

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age, it seems to me that there is as much colour of right for their feeding upon the commonable land as if they were turned on under a right of common appurtenant.]

This case is distinguishable from *Hall* v. *Harding* (1) on the ground that common pur cause de vicinage is a mere excuse for a trespass. The cattle have no right to be on the common; their coming there is merely a permitted trespass. The new assignment may be informal, but it is in effect a traverse of a material allegation in the plea, and is therefore good.

Bompas was not called upon to reply.

BLACKBURN, J. I think we need not trouble the plaintiff's counsel to reply. The real question is, whether the avowant, in this action of replevin is entitled to a return of the cattle which he claims. In order to establish that, he must shew that, having a right to distrain, he took them damage feasant.

In *Hall* v. *Harding* (1) cattle of a commoner had been distrained damage feasant by another commoner, and it was alleged that the owner of the cattle distrained had surcharged by putting on an excessive number of cattle; it was held that the distress could not be maintained, because a commoner must not take the remedy into his own hands where the cattle are on the common under a colour of right. At the end of the judgment the Court stated that "upon the whole the right of distress seemed to turn upon this, that wherever there is a colour of right for putting in the cattle, a commoner cannot distrain, because it would be judging for himself in a question that depends upon a more competent inquiry. But where cattle are put upon the common without any colour or pretence of right, the commoner may distrain them, and therefore he may distrain the cattle of a stranger." We think this doctrine binding upon us. The facts in the present case may be concisely stated as follows:—The plaintiff had a right to put his cattle on Uldale Common, which was adjacent to Caldbeck Common, the two commons lying open to each other, and by a prescriptive right common pur cause de vicinage existed between them; and the plaintiff having put his cattle on to Uldale Common they strayed on to Caldbeck Common, and there the defendant dis-

(1) 4 Burr. 2426.

trained them, on the ground that either the plaintiff or other commoners on Uldale Common had put thereon more cattle than they had a right to do. The mere statement of the facts discloses a matter which is debateable and doubtful, and the rights of the parties depend upon the result of a careful investigation. And this exactly brings the case within the rule laid down by Lord Mansfield, who says, that when the matter is doubtful and there is a colour of right, the commoner shall not take the law into his own hands, and determine the question for himself, and distrain damage feasant. The reasoning applies exactly to the present facts. The matter which the avowant has taken upon himself to determine in his own favour is a matter which ought to be investigated by the Courts of law, and ought not to be determined by the commoner summarily taking the remedy into his own hands.

It was argued that the above rule did not apply for the following reason: The origin of common pur cause de vicinage is no doubt an excuse for trespass upon each side, and in consequence the right of common may be determined by inclosure and by preventing the cattle on the one from trespassing on the other: this doctrine seems in accordance with the judgment of Lord Wensleydale in *Jones* v. *Robin* (1); he says that this right, "though not a profit à prendre, nor properly an easement, but rather an excuse for a trespass, has its origin from a presumed mutual grant or covenant between the owners of each farm that neither of them or their tenants should sue the other or his tenants or distrain, or perhaps even drive their cattle away, so long as the farms should respectively lie open to each other." It was urged, therefore, that common pur cause de vicinage was not a matter of strict right, inasmuch as it can be put an end to by inclosure so that the commonable lands will not lie open to each other, and that, as the plaintiff relies on a right of this kind, the defendants are entitled to distrain in case of a surcharge. But it is clear that while the lands do remain open the irrevocable licence created by prescription gives a commoner as much colour of right, if his cattle go on to the adjoining land, as he has when they are upon the land over which he has a right of common appurtenant. If the commoner has done wrong in putting on too many cattle, he has done wrong

(1) 10 Q. B. at p. 635.

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against his fellow commoners as much as against those of the neighbouring common. According to *Hall* v. *Harding* (1) his own fellow commoners cannot distrain, because it is a doubtful matter, and carries a colour of right, and ought not to be determined by either party in his own favour. So neither can the commoner on the adjoining common decide the question by distress; and to convince me that he can I should require some authority.

The question, whether the lord can distrain when there is a colour of right, has been mooted in the argument. We will decide that when the point arises; but in Gilbert on Distress, p. 23, it is laid down that the lord cannot distrain when there is a colour of right. We need not further advert to that.

I am of opinion here that the distress was a wrongful distress, and consequently the plaintiff is entitled to judgment. I shall only further observe that the concluding sentence of the new assignment is to be understood as being struck out, because we cannot understand what it means, and it simply embarrasses the issue which we have to dispose of.

QUAIN, J. I am of the same opinion, although I had some doubt whether one commoner cannot distrain upon another who has surcharged, in a case like this. But no authority has been cited, nor has any reason satisfactory to my mind been given why the rule that applies to common appurtenant does not apply to common pur cause de vicinage; that rule was clearly laid down in *Hall* v. *Harding* (1), and establishes that where one commoner surcharges another commoner cannot distrain; and the ground stated by Lord Mansfield is, that a commoner putting on the cattle had a colour of right, and therefore distress is not a proper remedy. Here it is stated in the new assignment, that the plaintiff, a commoner of Uldale Common, did surcharge that common, that is, he put on more cattle than Uldale Common could support. The plaintiff's cattle being there,—there being a common pur cause de vicinage between the two commons,—strayed upon Caldbeck Common, and the defendant, a commoner of Caldbeck Common, distrained. Now he seeks to put himself in a better position with regard to the plaintiff's cattle, which strayed under colour of the right, than he would have been in if

(1) 4 Burr. 2426.

he had had common appurtenant over Uldale Common itself. If the general principle laid down in *Hall* v. *Harding* (1) is correct, the plaintiff, in surcharging his own common, has done nothing except under a colour of right; and it seems to follow that the commoner of Caldbeck Common, when the cattle strayed there by virtue of this right of intercommonage, has no better right against the owner of these cattle than he would have had if he had been a commoner of Uldale Common. No authority is cited to shew that he could put himself in a better position, and although I had some doubt at first I have come to the conclusion that no valid distinction can be suggested between common appurtenant and common pur cause de vicinage. Therefore the plaintiff is entitled to our judgment.

ARCHIBALD, J. I am of the same opinion. I think it impossible to distinguish this case in principle from *Hall* v. *Harding*. (1) It has been attempted to distinguish it on the ground that that case related to common appurtenant, and did not apply to common pur cause de vicinage. Now common pur cause de vicinage was in its origin a mere excuse for a trespass; but although this circumstance may explain the way in which the right came originally into existence, yet unquestionably it has grown into a right resting on a sort of prescriptive licence, subject to this limitation, that by an act lawful in itself either party may inclose so as to prevent the cattle from straying, and by that means may put an end to the right. But upon the principle laid down in *Hall* v. *Harding* (1), as applied to the circumstances of this case, there was clearly a colour of right. I think the principle is not confined to cases as to commons, but is one of general application, viz. that where there is a colour of right a person believing himself aggrieved shall not take the law into his own hands; consequently, whether or not there is any other remedy, distress is not the remedy applicable to the case; and, therefore, I think our judgment ought to be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Bischoff, Bompas, & Bischoff.*
Attorneys for defendant: *Sharp & Ullithorne.*

(1) 4 Burr. 2426.

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Feb. 16.

THE VESTRY OF THE PARISH OF ST. MARY, ISLINGTON, APPELLANTS; BARRETT, RESPONDENT.

Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 106, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112—"*Street*"—"*New Street*"—*Liability of Owners of Houses for paving a New Street not dedicated to the Public.*

In the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 112, the expression "new street" is not confined to streets dedicated to the public.

The respondent was the owner of houses on both sides of a road, the footpaths of which on each side had been paved by the appellants, the vestry of the parish, and were used by the public. The carriage-way had never been dedicated to the public; the appellants paved the carriage-way, and sought to recover the expense from the respondent under 18 & 19 Vict. c. 120, s. 105, on the ground that the carriage-way was a new street:—

Held, that although the carriage-way had not been dedicated to the public, it was a new street within 25 & 26 Vict. c. 102, s. 112; and that the respondent was liable to pay the expense of paving it under 18 & 19 Vict. c. 120, s. 105.

CASE stated by Justices of Middlesex under 20 & 21 Vict. c. 43.

At a petty session for the county of Middlesex, held at Islington on the 12th of December, a complaint, made by the vestry of the parish of St. Mary, Islington, the appellants, against the respondent, for that he, being the owner of thirty-nine houses abutting on and forming part of St. John's Road, being a new street within the meaning of the Metropolis Management Act, 1855, and the several Acts amending the same, had refused to pay to them the sum of 427*l.* 11*s.* 6*d.*, being the proportion of the expense of making the road as determined by the surveyor of the appellants, was heard by the justices, when they dismissed it and ordered that the appellants should pay the costs.

1. The complaint against the respondent was made under the provisions of s. 105 of the Metropolis Local Management Act, 1855, whereby it is enacted, "that in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in

either of such cases such vestry or board shall well and sufficiently pave the same either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board."

2. The word "street" is defined by s. 250 (the interpretation clause) to "apply to and include any highway (except the carriage-way of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage."

3. It was admitted by the respondent that the resolutions of the vestry of the 7th of January, 1870, that the road in question should be made, and that the costs of making the same should be apportioned on the owners of houses abutting thereon, had been duly made; also that he was the owner of thirty-one of such houses; that demand for payment of the sum so apportioned was made upon him, and that he had refused to pay the same; and that, previously to the year 1861, he had applied to the vestry on many occasions to adopt the carriage-way and take the same under their jurisdiction, but that subsequently he had changed his mind and ceased to urge his request.

4. St. John's Road may be divided into two portions, of which the western led into the Junction Road, a public highway, and the eastern into Holloway Road, also a public highway; and it was admitted that the carriage-way only of the western portion was the "street" for the non-payment of the costs of making which the complaint was made; that the footways on each side had been already made by the appellants, and paid for by the lessees as owners.

5. It was also proved, on the part of the appellants, that the eastern portion of the carriage-way of St. John's Road had been made by the vestry pursuant to resolutions dated the 18th of May, 1866, and the 1st of November, 1867, under the provisions of s. 105 of the Metropolis Local Management Act, and paid for by the

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lessees as owners of houses abutting thereon; that the footpath on each side throughout the whole length of the road had also been made at the costs of the owners and maintained by the vestry, and that the public had free right to use the same; that the western portion of the carriage-way of the road was the part which the vestry had resolved to make, and which was then the subject of the proceedings against the respondent; that a barrier had been placed across the western portion of the carriage-way at one part; that there was an open space left for the passage of at least one carriage at a time, and it was admitted by the appellants that the passage of vehicles along this portion of the road had occasionally been refused.

6. The respondent contended that the portion of the carriage-way in question, that is, the western portion, had not been dedicated to the use of the public, either by himself or by the freeholders of the land; that the eastern portion of the road did not abut on the property which belonged to him at the time when the appellants resolved upon taking the eastern portion of the carriage-way under their jurisdiction, and that he took no part in the steps taken by the vestry to make that part and charge the costs on the then owners of the houses abutting thereon; that the western portion of the roadway was not a thoroughfare to any place except by passage, with his consent, through the barrier placed by him there, and that the road was not a street within the meaning of s. 105 of the Metropolis Local Management Act, 1855, but came within the provisions of the next section (106) of that Act, as altered by s. 80 of the 25 & 26 Vict. c. 102, which enacts "that the vestry of any parish may, if they think fit, by notice in writing put up in any part of any street in their parish, not being a highway, declare their intention of repairing the same under this Act, and thereupon the same shall be from time to time repaired by them under the authority of this Act:" provided (as amended by the 25 & 26 Vict. c. 102, s. 80), "that no street, not being a highway, shall be repaired as in the said section mentioned unless notice be given to the owners and rated occupiers in such street respectively; and provided, further, that no such street shall be repaired as in the said section mentioned if within one month after notice has been given as aforesaid, written notice of objection to such repair, signed by at

least two-thirds of the owners or rated occupiers of houses in the said street, shall be given to the vestry."

7. In support of this contention, the respondent proved in evidence that he had leased about twenty-four acres of land, situate between the Holloway Road and Junction Road, for building purposes, from the corporation of the Sons of the Clergy; that he had formed the road for the purposes of the houses built on each side of such road; that previous to 1863–1864 the road was partly, if not entirely, occupied by sawpits and building materials placed there by him; that from the year 1863 to the present time he had placed the barrier across it, as already mentioned, with an open space capable of being also closed by a folding bar, and had previously during that time, by himself or his servants, prevented the passage of vehicles along the same; that the freeholders had never given permission or sanction to the dedication of the road, and in fact had never interfered except as hereinafter mentioned; that upon one occasion he brought an action against a person for trespass, who persisted in passing along the road, and judgment having been suffered by default, he recovered damages for such trespass; and that at his request a notice from the corporation of the Sons of the Clergy, the freeholders, was given to the vestry on the 25th of April, 1870, that the corporation, as such freeholders and landlords of the estate, of which St. John's Road was part, objected to the road being made a public thoroughfare.

8. The justices found that on the western portion of the roadway, which was the subject of the complaint under consideration, there were no side roads or streets whereby or along which any thoroughfare might be made or created, so as to assume a dedication by the existence of any facility to persons to use a portion thereof as a thoroughfare; and that the barrier could and did, when the respondent caused it to be closed, effectually prevent the free passage of vehicles along the whole length thereof.

9. The justices were of opinion that the carriage-way of the road in question had not been dedicated to the public, and that therefore, considering the provisions of s. 106 of the Metropolis Local Management Act, 1855, as to streets not being highways, it was not a street within the meaning of s. 105 of the same Act, for the cost of making which the owners of houses abutting thereon were liable.

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10. The questions for the opinion of the Court were:—

1. Whether the respondent, by the steps he had taken to retain his right in the road in question, had avoided a dedication of the same to the public, so that it had not been dedicated.

2. If the road had not been dedicated to the public, whether it was a new street within the meaning of 18 & 19 Vict. c. 120, s. 105.

Nov. 15, 1873. *Thesiger, Q.C.* (*Sturge*, with him), for the appellants. It must be admitted that the finding of the justices was conclusive as to the question whether the road had been dedicated to the public. As to the second point, the proceedings were rightly taken under s. 105. The western portion of St. John's Road is a new street in the ordinary and popular sense of the term, and therefore a new street within the meaning of the Metropolis Management Acts (18 & 19 Vict. c. 120, s. 250, and 25 & 26 Vict. c. 102, s. 112): *Pound* v. *Plumstead Board of Works.* (1) In ordinary language a street is a roadway, either public or private, with a continuous line of houses on either side; it follows that a street may or may not be a highway. The Metropolis Management Acts treat of matters similar to those dealt with by the Public Health Act, 1848 (11 & 12 Vict. c. 63). Sect. 69 of the latter Act expressly refers to streets which are not highways. *Reg.* v. *St. Mary, Islington* (2) merely decided that under 18 & 19 Vict. c. 120, s. 130, the vestry had a discretion to determine whether they ought to light streets, and did not decide what a street was. *Le Neve* v. *Mile End Old Town* (3) was a case of obstruction and not of paving, and was decided under ss. 119 and 120 of 18 & 19 Vict. c. 120.

Manisty, Q.C. (*Poland* with him), for the respondent. The justices were right. The question is whether these proceedings ought to be taken under s. 105 or under s. 106 of 18 & 19 Vict. c. 120. There is a distinction between a roadway dedicated and repairable by the public, and a roadway not dedicated, and therefore not repairable. Sect. 105 applies to the former, and s. 106 to the latter. The vestry, therefore, have no power to pave the

(1) Law Rep. 7 Q. B. 183.
(2) E. B. & E. 743.
(3) 8 E. & B. 1054; 27 L. J. (Q.B.) 208.

street and interfere with a private right. *Reg.* v. *St. Mary, Islington* (1), is a decision in the respondent's favour. There the Court were of opinion that the vestry was not compelled to light a street which was not a highway. In *Curtis* v. *Embery* (2) the question which arose under the Public Health Act was, whether a piece of ground belonging to a railway company was a public road within the statute; and as there was no dedication, it was held it was not a public road. In *Kingston-upon-Hull* v. *Jones* (3) the Court of Exchequer seemed to be of opinion that a footpath, not being public, could not be a street within the meaning of 11 & 12 Vict. c. 63.

Thesiger, Q.C., was heard in reply.

Cur. adv. vult.

Feb. 16. The judgment of the Court (Quain and Archibald, JJ.) was delivered by

QUAIN, J. As to the first question, we think that the evidence set out in paragraph 7 justifies the finding of the justices that the street in question had not been dedicated to the public; and we are of opinion, therefore, that the finding of the justices on this point is conclusive, and cannot be disturbed on this appeal.

The next question is, assuming that the street has not been dedicated to the public, is it or can it be a "new street" within the meaning of s. 105 of 18 & 19 Vict. c. 120?

The 18 & 19 Vict. c. 120 has been amended by the 25 & 26 Vict. c. 102, which came into operation on the 7th of August, 1862. The present street was formed and laid out after the passing of the last-mentioned Act, and is therefore subject to its provisions. The first Act (s. 250) enumerates various things which the word "street" shall "apply to and include," and, amongst others, a highway; and the second Act (s. 112) still further extends the meaning of the word "street," and also enumerates the things to which the expression "new street" shall "apply and include." But, as was decided in *Pound* v. *Plumstead Board of Works* (4), these interpretation sections do not exclude the ordinary and popular sense of the words or expressions used.

(1) E. B. & E. 743.
(2) Law Rep. 7 Ex. 369.
(3) 1 H. & N. 489; 26 L. J. (Ex.) 33.
(4) Law Rep. 7 Q. B. 183.

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Now, we think, in the first place, that this street, or part of a street, is a "street" and a "new street" in the ordinary and popular sense of the words. It is a road with houses built on each side of it. These houses seem to have been built in 1863–4 (paragraph 7), and the footways adjoining the houses have been already paved by the vestry at the expense of the owners or occupiers of the houses, and are open to the public.

We further think that the part of the street in question is a "new street" within s. 112 of 25 & 26 Vict. c. 102. That section enacts that the expression "new street" shall "apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and opened by the authorities having the control of the pavements or highways in the parish in which such street is situate." This definition applies to all "new streets" in the ordinary sense of that expression, and even to old streets the maintenance of the paving and roadway whereof had not, before the passing of the Act, been taken into charge by the authorities having the control of the pavements and highways. We see no language in the Act which confines the expression "new street" to streets dedicated to the public.

The Metropolitan Management Acts were passed with sanitary objects in view, and relate to the sewerage and drainage, and the paving, cleansing, lighting, and improvements of the metropolitan districts. They are, in fact, public health Acts as well as local management Acts, and, being framed with that view, they confer very large and extensive powers on the authorities for the purpose of promoting the public health. Sect. 105, under which the vestry acted in this case, resembles s. 69 of the Public Health Act, 1868. That section applied to all streets present and future (except they were repairable by the inhabitants at large), and the object of the enactment is explained by Alderson, B., in these words, in the case of *Local Board of Health of Kingston-upon-Hull* v. *Jones* (1): "The object of the section is plain; where a road has been made which is not repairable by the parish, it may become a public nuisance or injurious to the public health, because

(1) 1 H. & N. 489; 26 L. J. (Ex.) at p. 34.

there is nobody bound to put it into a proper state, and the legislature thought it right that those who owned the property, for the convenience of whom the street is made, should be at the expense of preventing it from being a mischief to the public at large." It is obvious that the mischief may be the same whether the new street is or is not dedicated to the public, for though dedicated to the public it may not be repairable by the parish, and even though it may be an old highway and so repairable by the parish, it was held in *Pound* v. *Plumstead Board of Works* (1) that when converted into a new street the vestry may pave it under s. 105 and charge the expense on the adjoining owners.

It was argued for the respondent that, this street not being a highway, the vestry should have proceeded, not under s. 105, but under s. 106 as amended by s. 80 of 25 & 26 Vict. c. 102, and such appears to have been the opinion of the justices. But it seems to have been overlooked that ss. 105 and 106 relate to two different things; s. 105 relates to the "paving of new streets which the vestry deem it necessary or expedient should be paved, and the word "paving," by s. 112 of 25 & 26 Vict. c. 102, includes the formation of the roadway as well as paving in the ordinary sense. Sect. 106, on the other hand, relates only to the "repair" of streets, and not necessarily "new streets," not being highways and which have not been paved by the vestry, for where the new street has been paved by the vestry under s. 105 they are bound afterwards to keep it in sufficient repair.

For these reasons we think that the judgment of the justices is erroneous, and that it must be reversed.

Judgment for the appellants. (2)

Attorney for appellants: *J. Layton.*
Attorneys for respondent: *Crouch & Spencer.*

(1) Law Rep. 7 Q. B. 183.
(2) See *Reg.* v. *Hackney Board of Works* (Law Rep. 8 Q. B. 528).

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EMANUEL, JUDGMENT CREDITOR; BRIDGER, JUDGMENT DEBTOR; ROBERTS, GARNISHEE.

Garnishee Order Absolute, Effect of—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 63—*Bankruptcy of Judgment Debtor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16—"*Charge*"—*Bill of Sale*—17 & 18 *Vict. c.* 36, *ss.* 1, 7—*Apparent Possession of Grantor of Bill of Sale.*

An attachment under the Common Law Procedure Act, 1854, ss. 61–63, being a seizure by way of execution for a debt due from a specific person named in the garnishee order, resembles an actual seizure by a sheriff, and therefore a garnishee order absolute is a security on the property of the judgment debtor within the Bankruptcy Act, 1869, s. 12, and if he afterwards becomes bankrupt the execution creditor is a creditor holding security.

A creditor who has obtained and made absolute a garnishee order before the bankruptcy of his debtor is a creditor holding "a charge" on the bankrupt's estate, as a security for a debt due to him, within the Bankruptcy Act, 1869, s. 16, subs. 5.

When the grantee of a bill of sale takes possession of the goods comprised in it, and advertises them for sale as the goods of the grantor sold under a bill of sale, the goods, though still in the house of the grantor, are no longer in the apparent possession of the grantor within the meaning of 17 & 18 Vict. c. 36, ss. 1, 7; and the bill of sale, although not duly registered, is valid against an execution levied on the goods of the grantor.

RULE calling upon Joel Emanuel, judgment creditor, to shew cause why Thomas Bowman, trustee of William Bridger, judgment debtor, should not take out of court the proceeds of the sale of certain goods, notice of the rule being given to Benjamin James Chigwell.

Jan. 28, 30, 1873. *Horne Payne* shewed cause.

Bullen, in support of the rule.

The facts and arguments sufficiently appear in the judgment of the Court.

In addition to the cases referred to in the judgment the following cases were cited: *Ex parte Rocke* (1); *Newman* v. *Rook* (2); *Mitchell* v. *Lee* (3); *Gough* v. *Everard* (4); *Robinson* v. *Briggs*. (5)

Cur. adv. vult.

(1) Law Rep. 6 Ch. 795.
(2) 4 C. B. (N.S.) 434.
(3) Law Rep. 2 Q. B. 259.
(4) 2 H. & C. 1; 32 L. J. (Ex.) 210.
(5) Law Rep. 6 Ex. 1.

Feb. 16. The judgment of the Court (Cockburn, C.J., Mellor and Quain, JJ.) was delivered by

QUAIN, J. This is a rule calling upon Emanuel, the judgment creditor, to shew cause why the proceeds of the sale of certain goods, paid into court in these proceedings, should not be paid out of court to Thomas Bowman, the trustee in bankruptcy of Bridger, the execution debtor, notice of the rule being given to one Benjamin James Chigwell.

The facts on which the decision of the rule depends are as follows:—On the 20th of April, 1870, Emanuel obtained a judgment against Bridger for 45*l.* 15*s.* 10*d.* On the 22nd of April, 1870, Emanuel obtained a garnishee order nisi, attaching a debt due from Mary Roberts to Bridger, or such part of it as was sufficient to pay the judgment debt, and this order was served on the 23rd of April, 1870. On the 2nd of May, 1870, this garnishee order was made absolute, and the usual order was made under s. 63 of the Common Law Procedure Act, 1854, to levy so much of the debt due from Roberts to Bridger as was sufficient to satisfy the judgment debt, and on the same day a writ of fi. fa. against the goods of Mary Roberts was delivered to the sheriff. The amount at that time due from Roberts to Bridger was 55*l.* On the 3rd of May Bridger was adjudicated a bankrupt on an act of bankruptcy of the same date, and the registrar of the court was appointed trustee until a trustee was appointed at the first meeting of creditors. On the 4th of May the sheriff seized certain goods, as being the goods of Mary Roberts, the garnishee.

On the 11th of May notices of claims to these goods were given to the sheriff by Bridger's trustee; and Chigwell, an auctioneer, and the sheriff having interpleaded, it was arranged, with the consent of all parties, that the goods should be sold and the proceeds paid into court, to abide the result of any application by either of the parties to have the amount or any part of it paid out to him. The amount paid into court under this arrangement was 31*l.* 19*s.*

It now becomes necessary to give the dates of the transactions which affect the title to the goods so seized and sold. On the 21st of May, 1869, Mary Roberts executed a bill of sale of the goods in question to Bridger, to secure the repayment of the sum of 147*l.*,

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lent to her by Bridger, and this bill of sale was duly registered subject to a question on that point mentioned subsequently, and the goods remained in a house occupied by Mary Roberts till the seizure. By the terms of this bill of sale the goods were assigned to Bridger, subject to a proviso that, if Roberts repaid the debt by certain instalments, the deed should be void; but that, if she failed to pay any of the instalments, Bridger had a right to enter and seize the goods, and hold them for his own use absolutely, or at his option to sell the goods, and out of the proceeds to repay himself any part of the loan then due to him, and to pay the balance, if any, to Mary Roberts.

On the 22nd of April, 1870, the same day on which the garnishee order nisi was made, but subsequent to the garnishee order, there being then 55*l.* of the loan still unpaid, Bridger instructed Chigwell to enter and take possession of the goods, and sell them, in order to repay the 55*l.* Chigwell accordingly seized the goods, and put a man into possession of them on the same day.

On the 26th of April, 1870, Chigwell advanced Bridger 50*l.*, on the security of the goods, of which by his man he was then in possession, and Bridger authorized him to retain the advance out of the proceeds of the intended sale. At this time neither Bridger nor Chigwell had notice of any attachment.

On the 30th of April, Chigwell advertised the goods for sale in the *Hampshire Independent* newspaper for the 2nd of May, stating in the advertisement that they were the goods of Mary Roberts, sold under a bill of sale, and he posted up announcements of the sale in the neighbourhood, and on the same day he received the first notice of the attachment.

On the 2nd of May, Roberts obtained an interim injunction to restrain the sale, and in consequence of this the sale, as advertised for the 2nd of May, did not take place. This injunction was afterwards dissolved, and Roberts, in consequence of a warrant for perjury, committed in obtaining the injunction, having been issued against her, absconded. Before another day for the sale could be arranged, the sheriff entered and seized the goods, on the 4th of May, as already mentioned.

On this state of facts two questions arise for consideration. The first relates to the debt due from Roberts to Bridger, or

rather to that part of it attached by the garnishee order, and as to whether the garnishee order is in any way affected by the subsequent bankruptcy of Bridger. The second relates to the property in the goods seized under the fi. fa., and, as consequent on that question, the distribution of the money paid into court.

It will be seen from the above dates that in this case the garnishee order was obtained, served, and made absolute, and a fi. fa. lodged with the sheriff to enforce it on the goods of Roberts, before any act of bankruptcy committed by Bridger. Short, therefore, of execution actually levied on the goods of the garnishee, or payment of the debt, everything had been done to perfect the title of the execution creditor to so much of the debt as was sufficient to pay the amount of the judgment before the bankruptcy.

The position of an execution creditor after a garnishee order was obtained and served, in relation to the assignees in bankruptcy of the execution debtor, and their claim to the debt attached by the garnishee order, was much considered in *Holmes* v. *Tutton*. (1) It was there held that an execution creditor, who had obtained and served a garnishee order before the bankruptcy of the debtor, was in the position of a creditor having security for his debt within s. 184 of the Bankruptcy Act, 1849, but that he had no mortgage or lien within the exception in the same section. The judgment of the Court, therefore, was that the debt, not having been realised before the adjudication in bankruptcy, passed to the assignees. That case was followed by *Tilbury* v. *Brown* (2), before Crompton, J. There the garnishee order nisi had been served and the order absolute obtained before the bankruptcy. Both these decisions, however, were founded on the enactments contained in s. 184 of the Bankruptcy Act, 1849. That Act has since been repealed by the Bankruptcy Act, 1869, and there being no section in the latter Act similar to s. 184 of the Act of 1849, it follows that the judgments referred to, so far at least as they relate to the question of lien, are not applicable to the present case.

The section of the Bankruptcy Act, 1869, which applies to the case now before the Court is s. 12. That section enacts that where a debtor shall be adjudicated bankrupt, no creditor whose

(1) 5 E. & B. 65; 24 L. J. (Q.B.) 346. (2) 30 L. J. (Q.B.) 46.

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debt is proveable under the bankruptcy shall have any remedy against the person or property of the bankrupt, except in manner directed by that Act. But it further provides that that section shall not affect the power of any creditor "holding a security on the property of the bankrupt" to realise his security as if that section had not been passed. The question, therefore, is whether the execution creditor in this case held a security on the property of his debtor before the bankruptcy.

It would seem to follow from *Holmes* v. *Tutton* (1) that an execution creditor, who had obtained and served a garnishee order nisi, and à fortiori an order absolute, before the bankruptcy, is a creditor holding a security on the property of the bankrupt within s. 12 of the last Act, as there is no practical difference between the language of s. 12 of the present Act and the first part of s. 184 of the old Act. Counsel for the trustee relied much on *Ex parte Williams.* (2) There it was decided, in accordance with *Slater* v. *Pinder* (3), that the mere delivery of the writ to the sheriff did not make the execution creditor a creditor holding security, and that actual seizure was essential for that purpose; and in *Holmes* v. *Tutton* (1), Lord Campbell, C.J., in delivering the judgment of the Court, while holding that the garnishee order did constitute a security for the debt, still held that it bound the debt only in the same way and to the same extent as the delivery of the writ to the sheriff; so that if *Holmes* v. *Tutton* (1) be right, on the latter point, *Ex parte Williams* (2) would amount to a decision that the garnishee order does not constitute a security for the debt.

It appears to us, however, that the attachment, or seizure by way of execution for a debt due from a specific person named in the order, resembles an actual seizure of goods by the sheriff much more than the delivery of the writ to the sheriff, which binds no specific goods, but merely the property of the debtor in general. The execution creditor can do no further act, as regards the debt attached, than to obtain his garnishee order, serve it, and make it absolute. We think, therefore, that the garnishee order, especially when, as in this case, it was made absolute

(1) 5 E. & B. 65; 24 L. J. (Q.B.) 346.
(2) Law Rep. 7 Ch. 314.
(3) Law Rep. 6 Ex. 228; Law Rep. 7 Ex. 95.

before the bankruptcy, does constitute the execution creditor a creditor holding security on the property of the bankrupt within s. 12 of the Bankruptcy Act, 1869.

But apart from this question there is another point which seems to us decisive on this part of the case. The Bankruptcy Act, 1869, contains a definition of a "secured creditor" as used in that Act. Sect. 16, subs. 5, enacts that a "secured creditor" shall in this Act mean "any creditor holding any mortgage, charge, or lien on the bankrupt's estate or any part thereof as a security for a debt due to him." Now, we apprehend that a secured creditor within this section and "a creditor holding a security" mentioned in s. 12 mean the same thing. But it will be observed that in the definition in s. 16 the word "charge" is introduced, which is not to be found in s. 184 of the Act of 1849.

We think that the word "charge" has a wider meaning than the words "mortgage" or "lien," and we cannot doubt but that an execution creditor who has obtained, served, and made absolute his garnishee order before the bankruptcy, is a creditor holding a charge on a part of the bankrupt's estate as a security for a debt due to him within s. 16, subs. 5, and is therefore a creditor holding a security on the property of the bankrupt under s. 12.

Under these circumstances, the execution creditor was entitled to receive from Roberts 45*l.* 15*s.* 10*d.* out of the debt of 55*l.* then due from Roberts to Bridger. But Roberts having failed to pay the amount, the usual order was made under s. 63 to levy the amount due from the garnishee, and her goods were accordingly seized under the execution on the 4th of May, as before stated.

At that time the bankrupt and his trustee were interested in the goods under the bill of sale only to the extent of the difference between the balance of the debt then due from Roberts (55*l.*) and the judgment debt (45*l.* 15*s.* 10*d.*), namely, 9*l.* 4*s.* 2*d.*, and Chigwell, who made his advance on the 26th of April (the garnishee order having been served on the 23rd of April), could not be in a better position than Bridger, or take any greater interest in the goods than Bridger then had. The value of the goods being greater than Bridger's interest in them at the time of the seizure,

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an order might have been made to sell them under s. 16 of the Common Law Procedure Act, 1860.

Under these circumstances, the rule will be that 9*l.* 4*s.* 2*d.* of the money in court shall be paid to Chigwell (who had advanced his money and held possession of the goods before the bankruptcy), and the rest to the execution creditor.

On the part of the execution creditor the validity of the bill of sale was challenged, on the ground that the occupation of the grantor was not correctly described. But we think that the Bills of Sale Act does not apply to this case, as we consider that the acts of Chigwell in taking possession of and advertising the goods for sale, as above mentioned, were sufficient to take the goods out of possession, or apparent possession, of the grantor at the time of the seizure: see *Ex parte Lewis* (1), and the cases there cited.

Rule absolute accordingly.

Attorney for judgment creditor: *Joel Emanuel.*

Attorneys for judgment debtor's trustee in bankruptcy: *Whyte, Collisson, & Prichard.*

Jan. 24.

MULLINS, APPELLANT; COLLINS, RESPONDENT.

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 16—*Supplying Liquor to Constable on Duty—Knowledge of Licensed Victualler—Mens rea.*

The servant of a licensed victualler knowingly supplied liquor to a constable on duty, without the authority of his superior officer:—

Held, that the licensed victualler was liable to be convicted under 35 & 36 Vict. c. 94, s. 16, subs. 2, although he had not knowledge of the act of his servant.

CASE stated by Justices of Devon under 20 & 21 Vict. c. 43.

The appellant was charged, at the Petty Sessions holden at Collumpton, on an information that he, being a person duly licensed to sell by retail exciseable liquors in his house and premises there situate, unlawfully did supply a certain liquor called brandy by way of sale to one R. G. Joint, a constable on duty, without the

(1) Law Rep. 6 Ch. 626.

authority of some superior officer of such constable, contrary to s. 16 of 35 & 36 Vict. c. 94. (1)

At the hearing it was proved on the part of the respondent that the constable R. G. Joint was on duty at Collumpton on the 7th of May, 1873, having been specially ordered there from his regular station; that the appellant's house was in the district of duty for such day; that whilst on duty and in uniform on that day, at three o'clock in the afternoon, he visited the appellant's house, called the Railway Hotel, in Collumpton, and was there supplied by a female (whether the wife or servant of the appellant the respondent did not know) with some brandy, for which he paid threepence; that he had no authority from any superior officer to be supplied with any liquor or refreshment, and that he did not state to the person who supplied him with the brandy that he had any authority from any superior officer, and that he was not asked the question whether he had such authority or not; that he had read and signed written instructions as to his district of duty—which included the appellant's house—on the day in question, and that such instructions, which were put in evidence, stated (amongst other things) that "any constable found drinking at any public-house during the hours appointed for his being on duty will be reported;" that he was not called into the appellant's house in the execution of his duty by any person whilst on duty, and that he had voluntarily gone into the house; that he had not, nor had his superior officer, given any notice to the appellant that he was on duty at Collumpton on the day in question, and that he was not asked by any one in the house whether he was on duty or not.

(1) 35 & 36 Vict. c. 94, s. 16: "If any licensed person (1.) knowingly harbours or knowingly suffers to remain on his premises any constable during any part of the time appointed for such constable being on duty, unless for the purpose of keeping or restoring order, or in execution of his duty; or (2.) supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable; or (3.) bribes or attempts to bribe any constable, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding, for the second or any subsequent offence, twenty pounds. Any conviction for an offence under this section shall, unless the convicting magistrate or justices shall otherwise direct, be recorded on the licence of the person convicted."

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The appellant called no witnesses; and it was admitted by him that the brandy was sold and supplied to the constable at his house by his servant; but it was contended by him: First, that before he could be convicted of any offence under s. 16 of 35 & 36 Vict. c. 94, it must be proved that such offence was committed either by himself personally or with his knowledge, and that he must be actually present at the time the liquor was supplied to the constable, or that the same must be supplied under his express authority. Secondly, that even assuming that it was not necessary to prove that the offence was committed by the appellant personally, or with his knowledge or express authority, before he could be convicted of the offence it must be proved that he or his servant knew the constable to be on duty at the time when the liquor was supplied. Thirdly, that notwithstanding s. 35, and notwithstanding the appellant's house being in the district allotted to the constable, the constable was not on duty when he entered the appellant's house, and that in fact he had deserted his duty at the time he entered the house.

The justices were of opinion that the evidence brought the case within the operation of s. 16, and convicted the appellant.

The question for the opinion of the Court was whether the conviction was right.

Poland, for the appellant, contended that the conviction could not be supported unless the appellant was himself aware that the liquor was supplied to the constable: *Chaney* v. *Payne* (1); *Hearne* v. *Garton* (2); *Nichols* v. *Hall.* (3)

[QUAIN, J., referred to *Reg.* v. *Stephens.* (4)]

The respondent did not appear.

BLACKBURN, J. I think that, on the facts of this case as stated, the conviction is right. Sect. 16 makes it an offence if any licensed person supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable. That has, according to the facts of this case, been actually done. The constable was on duty, he was

(1) 1 Q. B. 712.
(2) 2 E. & E. 66; 28 L. J. (M.C.) 216.
(3) Law Rep. 8 C. P. 322.
(4) Law Rep. 1 Q. B. 702.

in uniform, and he was supplied with liquor without the authority of his superior officer. Mr. Poland has argued that, in order that an offence should be committed, the liquor should have been supplied to the knowledge of the licensed person. If we hold that there must be a personal knowledge in the licensed person, we should make the enactment of no effect. I wish to guard myself from being understood to give any opinion as to whether or not, if the servant had not knowledge that the constable was on duty, the publican could be convicted. From the facts of the case it must be inferred that the servant who supplied the liquor knew that the constable was on duty.

QUAIN, J. We must look at the nature of the act done. How does a licensed victualler carry on his business? He frequently supplies the liquor, not personally, but through his servants. Then does the supply of liquor without the knowledge of the licensed person, by his servant, to a constable on duty amount to an offence under s. 16? Here the servant sold the liquor in the ordinary way to the constable, who was in uniform and on duty, and she did not inquire whether he had the authority of his superior officer. If we held that, on these facts, the licensed victualler was not liable for the act of his servant, we should render the enactment wholly inoperative. If the servant honestly believed that the constable had the authority of his superior officer, or if the servant did the act clandestinely, the master would not be liable; but none of these considerations arise in the present case.

ARCHIBALD, J. I am of the same opinion. In construing this enactment adversely to the appellant, we are not interfering with the maxim that, before a person can be criminally convicted, he must be shewn to have a mens rea. Sect. 16 is one of a series of clauses headed "offences against public order," and must, therefore, be construed in the way most effective for maintaining public order. It contains three subsections, the first of which creates offences which must be "knowingly" committed; but the appellant has been convicted under the second subsection, where the word "knowingly" is omitted. This seems to point to the conclu-

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sion that the licensed victualler will be liable for the act of his servant, although he himself has not knowingly committed an offence against the second subsection. If it had been shewn that the servant did not know the constable to be on duty, our decision might have been different.

Conviction affirmed.

Attorney for appellant: *C. M. Stretton.*

Jan. 17.

HOARE *v.* THE METROPOLITAN BOARD OF WORKS.

The Metropolitan Commons Act, 1866 (29 & 30 *Vict. c.* 122)—*Metropolitan Commons Supplemental Act*, 1871 (34 & 35 *Vict. c. lvii.*)—*Beneficial Right—Easement—Erection upon Metropolitan Common.*

The Metropolitan Commons Act, 1866, s. 15, enacts that no estate, interest, or right of a profitable or beneficial nature in, over, or affecting a common, shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme under that Act without compensation being made or provided for the same. A common within the meaning of the Act was placed under the management of the Metropolitan Board of Works by a scheme confirmed by the Metropolitan Commons Supplemental Act, 1871. Paragraph 5 of the scheme gave the board power to make bye-laws. Paragraph 13 of the scheme secured to all persons such estates, interest, or right as they had before the confirmation of the scheme. The board made a bye-law forbidding the erecting on the common of any posts or poles, or any building of any kind. There was a public-house adjoining the common, and near to it upon the common had stood for forty years a post bearing the sign of the public-house. The sign-post having been blown down, the appellant, the mortgagee of the public-house, at the request of the occupier, erected a new one. The appellant was convicted under the bye-law of unlawfully erecting the new sign-post:—

Held, that, a sign-post having stood for forty years, an easement had been gained in respect of the public-house, that as an incident to the easement the right existed of repairing the sign-post whenever it was broken, and that the easement was a beneficial right preserved by the Metropolitan Commons Act, 1866, s. 15, and paragraph 13 of the scheme relating to the common; and that, therefore, the conviction could not be upheld.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The appellant was convicted on an information, charging that she, on the 7th of January, 1873, in the parish of Greenwich, did

unlawfully erect on Blackheath, without the consent of the respondents in writing, a certain new sign-post contrary to the bye-laws made in pursuance of the Metropolitan Commons Supplemental Act, 1871 (34 & 35 Vict. c. lvii.).

The common of Blackheath is a common within the meaning of the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122).

By s. 6 of that Act a scheme for the establishment of local management, with a view to the making of bye-laws and regulations for the prevention of nuisances on a metropolitan common, may be made under that Act, on a memorial in that behalf presented to the Inclosure Commissioners by the local authority, who in the present case were the respondents.

By s. 14 every scheme shall state what rights (if any) claimed by any person or class of persons are affected by the scheme, and in what manner and to what extent they are affected thereby, and whether or not the scheme has been, in relation thereto, consented to by that person or class of persons, or any of them.

By s. 15 no estate, interest, or right of a profitable or beneficial nature shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme without compensation being made or provided for the same.

By s. 22 a scheme certified by the commissioners shall not, of itself, have any operation; but the same shall have full operation when and as confirmed by Act of Parliament, with such modifications (if any) as to Parliament seem fit.

By paragraph 1 of the scheme it was provided that the common of Blackheath, hereinafter called "the heath," should, for all the purposes of the scheme, be regulated and managed by the respondents.

By paragraph 4 of the scheme made in pursuance of such Act the respondents shall maintain the heath free of all encroachment, and shall permit no trespass on, or partial or other inclosure of any part thereof; and no fences, posts, rails, or other matters or things shall be maintained, fixed, or erected thereon without the consent in writing of the respondents.

By paragraph 5 of the scheme it was provided that the respondents should frame bye-laws and regulations against encroachments,

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for the preservation of order on the heath, for the prevention of nuisances, and to prevent any trespassers or persons who, by any erections or otherwise, should occupy any portion of the heath without the consent of the respondents.

Paragraph 13 of the scheme saves to all persons and their respective heirs, successors, executors, and administrators, all such estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the heath, or any part thereof, as they or any of them had before the confirmation of that scheme by Act of Parliament, or could or might have enjoyed if that scheme had not been confirmed by Act of Parliament.

The scheme was confirmed by the Metropolitan Commons Supplemental Act, 1871 (34 & 35 Vict. c. lvii.).

By a bye-law made in pursuance of the scheme certain matters mentioned in certain rules are prohibited and declared to be offences pursuant to the Commons Supplemental Act, 1871, and, amongst other things, it was forbidden to erect on the heath, unless with the consent of the respondents in writing, any posts, rails, fences, poles, tents, booths, or any building of any kind whatsoever.

Adjacent to the heath, and facing a certain road, is a publichouse called The Princess of Wales; and on the heath and close to the publichouse, and on the opposite side of the road, is a signpost fixed into the soil of the heath, with the sign or name of the publichouse or other inscription relating to the publichouse, for the purpose of more profitable occupation of the publichouse.

The publichouse has always, during more than forty years before the confirmation of the scheme by the Metropolitan Commons Supplemental Act, 1871, and until the erection of the new signpost complained of by the respondents, been occupied as a tavern or publichouse, and during all that time the occupiers of it have always as of right, without interruption and for the more profitable and beneficial occupation of it, erected and fixed into the soil of the heath, on the opposite side of the road and upon the spot where the new signpost is erected, a signpost with the sign or name of the publichouse or other inscription relating to the public-

house, and from time to time, as any signpost became broken or decayed, or fell down, or from any other cause it became desirable to replace it, removed such signpost and replaced it by another.

At the time of the passing of the Metropolitan Commons Supplemental Act, 1871, and of the erection of the new signpost complained of, the publichouse was, and still is, occupied by W. Wise, under a lease dated the 2nd of December, 1858, from the owner thereof, whereby the same was demised to the lessee, together with all rights, easements, profits, commodities, advantages and appurtenances whatsoever to the same belonging or appertaining, or therewith theretofore usually held, used, occupied or enjoyed; the appellant was and is the mortgagee of that lease.

Shortly before the complaint, and after the passing of the Metropolitan Commons Supplemental Act, 1871, and the making and confirmation of the bye-laws, the signpost which had been erected in 1857, in place of another then removed, was broken by the wind, and thereupon the appellant, at the request of Wise, caused it to be replaced by a new one.

The respondents contended that, the old signpost having been removed, Wise had not, nor had the appellant at his request, any right to erect a new one in its place.

The appellant contended that at the time of the passing of the Metropolitan Commons Supplemental Act, 1871, the occupier of the publichouse had a right to keep a signpost erected at the spot in question, and from time to time to remove any one so erected, as it became broken or decayed, and replace it by another, and that such right was a profitable and beneficial right reserved by the Metropolitan Commons Act, 1866.

The question for the opinion of the Court was whether Wise, or the appellant at his request, or otherwise, had a right to erect the new signpost without the consent of the respondents in writing.

Dixon, for the appellant. The conviction cannot be supported. The right claimed is an easement which might have been granted by the lord of the soil, and to repair the signpost is an incident to the enjoyment of the easement.

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[BLACKBURN, J., referred to *Pomfret* v. *Ricroft.* (1)]

The right is profitable and beneficial to the occupier of the publichouse, and therefore was reserved by paragraph 13 of the scheme, and by s. 15 of 29 & 30 Vict. c. 122. *Tyson* v. *Smith* (2) seems to shew that even a custom similar to the right claimed may be good.

[QUAIN, J., referred to *Lockwood* v. *Wood.* (3)]

Lord, for the respondents, admitted that on the principle of the decision in *Lancaster* v. *Eve* (4) the conviction could not be upheld.

BLACKBURN, J. The question is, whether the right to erect and repair the signpost is an estate, interest, or right in, over, or affecting the heath. It is difficult to see why it is not. It is a right which the lord of the soil could grant. *Lancaster* v. *Eve* (4) is in point.

QUAIN, J., concurred.

Judgment for the appellant.

Attorneys for appellant: *Withall & Compton.*
Attorney for respondents: *W. W. Smith.*

(1) 1 Wms. Saund. 321.
(2) 9 A. & E. 406.
(3) 6 Q. B. 31.
(4) 5 C. B. (N.S) 717; 28 L. J. (C.P.) 235.

[IN THE EXCHEQUER CHAMBER.]

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Feb. 2.

SWIFT *v.* JEWSBURY (P. O.) AND GODDARD.

*False Representation—Signature of Party to be Charged—*9 *Geo.* 4, *c.* 14, *s.* 6 *—Signature of an Agent of a Company formed under* 7 *Geo.* 4, *c.* 46*—Principal and Agent—Action against Joint Tortfeasors.*

The plaintiff sued J. and G. jointly for a false representation with respect to the solvency of R. The defendant J. was sued as the public officer of a banking company formed under 7 Geo. 4, c. 46, and the defendant G. was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to the manager of the defendant's banking company, requesting information whether R. was responsible to the extent of 50,000*l.* The defendant G. replied in his own name, signing his letter as manager, and giving a favourable account of R.'s responsibility. The plaintiff, in consequence of this letter, supplied R. with goods, for which he never was paid, in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendant's banking company had no knowledge, otherwise than through G., that such letter had been written, and gave him no express authority to write the letter; but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager :—

Held, first (affirming the judgment of the Court of Queen's Bench), that G. was liable personally for the false representation.

Secondly, that, by 9 Geo. 4, c. 14, s. 6, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, and not by an agent; and that, therefore, if G. were to be considered an agent, the banking company was not liable.

Thirdly (overruling the judgment of the Court of Queen's Bench), that the signature of G. to the letter could not be considered the signature of the banking company itself.

Fourthly, that the letter was the representation of G., and not the representation of the banking company.

APPEAL from the Court of Queen's Bench discharging two rules to enter a verdict for the defendants. (1)

1. This is an action against L. Winterbotham, as registered public officer of the Gloucestershire Banking Company, for whom F. C. Jewsbury, also a registered public officer of the company, has been substituted on the record on a suggestion of the death of L. Winterbotham; and against T. B. Goddard, sued in his personal capacity, to recover damages for an alleged false and fraudulent representation contained in the letter hereinafter set forth.

(1) Law Rep. 8 Q. B. 244.

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2. At the trial, before Cockburn, C.J., at the sittings in London after Hilary Term, 1872, the following evidence was given:—

3. The plaintiff at the time in question carried on the business of a steel manufacturer at Havelock Mills, Sheffield.

4. The Gloucestershire Banking Company carried on the business of bankers under the statute of 7 Geo. 4, c. 46, at Gloucester, and at various other towns in the county of Gloucester and the adjoining counties.

5. The defendant Goddard is manager of a branch bank of the company at Cheltenham, in the county of Gloucester.

6. In the month of November, 1867, Sir W. Russell, Bart., opened an account at the Cheltenham branch of the bank, and he continued to be a customer of the bank at the branch until his insolvency in or about February, 1870.

7. In the early part of the month of November, 1869, Hislop applied to the plaintiff to supply Sir W. Russell with 500 tons of iron rails, to be paid for by a bill for 2937*l.* 10*s.*, to be drawn by T. Hutchings upon, and accepted by Sir W. Russell.

8. The plaintiff asked for a reference, and Hislop then referred him to the Gloucestershire Banking Company at Cheltenham.

9. The plaintiff was desirous of having the bill discounted by the Sheffield and Hallamshire Bank, of which he was a customer, and he requested A. Holdsworth, the manager of the bank, to inquire of the Gloucestershire Banking Company at Cheltenham whether Sir W. Russell was good for the bill.

10. The sub-manager of the Sheffield and Hallamshire Bank thereupon, by the direction of Holdsworth, filled up and sent to the manager of the Cheltenham branch of the Gloucestershire Banking Company, after shewing it to the plaintiff, one of the forms used in the office for the making of such inquiries (the words in italics being printed):—

"Sheffield and Hallamshire Bank, Sheffield, Novr. 8, 1869. *Sir,—I shall be much obliged by the favour of your opinion in confidence of the respectability and standing of* Sir W. Russell, Bart., M.P. for Norwich, *and whether you consider him responsible to the extent of* 50,000*l.—I am, Sir, yours faithfully,* H. J. Wells, Sub*manager.*

"The Manager, Gloucestershire Banking Co., Cheltenham."

11. The 50,000*l.* mentioned in the letter was not mentioned by

the plaintiff to Holdsworth or his sub-manager, but was inserted in the letter without any instructions from the plaintiff.

12. In answer to the letter the defendant Goddard wrote and sent to the manager of the Sheffield and Hallamshire Bank the following letter:—

"Gloucestershire Banking Co., Cheltenham, 9th Nov. 1869. The Sheffield and Hallamshire Bank, Sheffield. Gentlemen,—I am in receipt of your favour of the 8th inst., and beg to say in reply that Sir W. Russell, Bart., M.P. for Norwich, is the lord of the manor of Charlton Kings, near this town, with a rent-roll, I am told, of over 7000*l.* per annum, the receipt of which is in his own hands, and has large expectancies; and I do not believe he would incur the liability you name unless he was certain to meet the engagement. —I am, Gentlemen, yours faithfully, T. B. Goddard, Manager."

13. Upon receipt of the letter of the 9th of November, Holdsworth laid the same before the directors of his bank, who thereupon consented to discount the proposed bill.

14. Holdsworth then told the plaintiff that the reply was satisfactory, and thereupon the plaintiff, acting solely upon the faith of the representation, completed the sale of the rails by handing a delivery order for them to Hislop and receiving from one Pooley, who was then a clerk of Sir W. Russell, a bill for 2937*l.* 10*s.* upon Sir W. Russell, indorsed by Thomas Hutchings, the drawer of the bill.

15. The Sheffield and Hallamshire Bank afterwards discounted the bill, relying on the representation contained in the letter of the 9th of November.

16. In the month of February, 1870, and before the bill arrived at maturity, Sir W. Russell became insolvent; Hutchings also became insolvent, and the plaintiff has never received payment of the bill or any part of it.

17. It was stated by Holdsworth to be the ordinary practice of bankers to make, on behalf of their customers, inquiries of other banks as to the solvency of the customers of those other banks, and also to answer such inquiries when addressed to them by other banks, but not when addressed to them by private persons, and that it was also the custom for managers of joint stock banks to make and answer such inquiries without consulting the board of

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directors; and Holdsworth further stated that the words "in confidence" meant that the bank would make no undue use of the information conveyed to them by the reply; and it was also stated by W. P. Price, who had been for the last nine years chairman of the Gloucestershire Banking Company, and who had been since 1840 a director of the company, that the making and answering of such inquiries was done as a matter of courtesy and convenience among bankers, and that by a sort of freemasonry among bankers, and in confidence with each other, they do ask and answer these questions.

18. The letter of the 9th of November was written by the defendant Goddard without any communication with any of the other officers or the directors of the Gloucestershire Banking Company, and was not seen by or known to any of them.

19. Evidence as to the constitution and management of the Gloucestershire Banking Company was given by W. P. Price, who had been chairman of the company for the last nine years, and a director of the company since 1840, to the following effect:—

20. The head office of the company is at Gloucester, and the company has fifteen branch banks at various towns in Gloucestershire and the adjoining counties, of which Cheltenham is one.

21. A full board of directors meets at Gloucester on the first Friday of every month, and a managing committee, known as the Weekly Committee, meets at Gloucester every Saturday.

22. It is the practice for the manager of any particular branch to open accounts with customers at his branch without communication with the general manager or the board of directors, and afterwards to report them to the general manager, who reports them to the board; but in special cases, or where the amount is large, the manager refers the applicant to the head office, and in some cases the applicant himself makes the preliminary arrangements at the head office.

23. It is the duty of the general manager of the company to report to the chairman any accounts which he deems in an unsatisfactory state, and it is the duty of the chairman to report the same to the board.

24. No suspicion was entertained by the chairman as to the account of Sir W. Russell, and no report was made by the chairman to the board on the subject of the account of Sir W. Russell until

the first meeting in February, in 1870. In the ordinary course of business communication would have been made by the general manager to the chairman of any account of which he entertained a suspicion or as to which he was uneasy; the general manager was in constant communication with the chairman, both personally and by letter; but no such communication was made by him with respect to the account. He died before the trial of this cause.

25. The Lord Chief Justice directed the jury that if they thought that the defendant Goddard wrote the letter of the 9th of November with an intention of misleading the parties who were making the inquiry, and for the purpose of inducing them to give credit to Sir W. Russell, not to the amount of 50,000*l.*, but whatever the amount might be, they should find a verdict for the plaintiff; and he also left to the jury the question whether it was within the scope of the authority of a manager of a banking company such as the Gloucestershire Banking Company to answer inquiries, not merely in his individual character, but as a representative of the banking company whose manager he was; saying that it might become a question of considerable importance by-and-by, with a view, not to the liability of Goddard himself, but of the company, whose representative he was, as manager of that branch of the bank; and that therefore, although his Lordship thought it would depend more on the law than on the fact, he would ask them to say what, upon the evidence they had heard, in their opinion, was the answer that ought to be given to the question: Was it within the scope of the authority with which the manager of a branch bank of this description was invested to answer such inquiries? But his Lordship reserved leave to the defendant Winterbotham to move to enter a nonsuit or a verdict for him, and to the defendant Goddard leave to move to enter a verdict for him on the grounds mentioned in the rules.

26. The jury found a verdict for the plaintiff for 3059*l.* 17*s.* 11*d.*, and they also answered the second question left to them by the Lord Chief Justice in the affirmative.

A rule was accordingly obtained on behalf of the defendant Winterbotham, on the ground that there was no writing signed by the bank; that the defendant Goddard was not the agent of the bank to sign; that the bank were not liable for a false represen-

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tation by the defendant Goddard; that there was no representation by the bank to the plaintiff; and that there was no representation by the bank, or false statement by them; and also for a new trial, on the ground that the verdict was against the weight of evidence.

A rule was also obtained on behalf of the defendant Goddard, on the ground that the verdict was against the weight of evidence, and on the ground of misdirection in the Lord Chief Justice in not telling the jury that the defendant Goddard had not made himself liable, the representation of the 9th of November, 1869, not being signed by him in his personal capacity, and no misrepresentation being signed by him within Lord Tenterden's Act (1); or why a verdict should not be entered for the defendant Goddard, on the ground that the alleged misrepresentation was not made to the plaintiff, and that the Sheffield and Hallamshire Bank were not the agents of the plaintiff to make the inquiry contained in the letter of the 8th of November, 1869.

Both these rules were afterwards discharged by the Court of Queen's Bench. (2)

The questions for the opinion of the Court of appeal were:—

First, whether the defendant Jewsbury, as such public officer, was entitled to have the verdict entered for him.

Second, whether the defendant Goddard was entitled to have the verdict entered for him.

Third, whether the defendant Goddard was entitled to a new trial on the ground of the alleged misdirection.

Benjamin, Q.C. (*Sir J. B. Karslake, Q.C.*, and *Anstie* with him), for the defendant Jewsbury. First, the banking company and Goddard cannot both be liable in the action. The Court below decided that both the defendants were liable on the representation signed by Goddard. That cannot be. Goddard cannot have signed the document in two capacities: as agent for the bank, so

(1) 9 Geo. 4, c. 14, s. 6: "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealing of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (sic), unless such representation or assurance be made in writing signed by the party to be charged therewith."

(2) See Law Rep. 8 Q. B. 244.

as to make the bank liable, and also on his own behalf, so as to make himself personally liable. The judgment of the Court below is therefore erroneous. Secondly, in order to charge a person upon a written representation as to the credit of another person, the document must be signed by the party himself, and therefore the banking company are not liable on a representation signed by Goddard. By 9 Geo. 4, c. 14, s. 6, no action shall be brought whereby to charge any person upon any representation made concerning the credit, ability, trade, or dealing of any other person to the intent that such other person may obtain credit, money or goods, unless such representation be made in writing and signed by the party to be charged therewith. This section requires two things: that the representation shall be in writing, and also that it shall be signed by the "party to be charged." In *Hyde* v. *Johnson* (1) it was decided that the signature of an agent is insufficient. The Mercantile Amendment Act (19 & 20 Vict. c. 97), s. 13, applies only to ss. 1 and 8 of 9 Geo. 4, c. 14; it leaves untouched s. 6; so that under that section the representation as to the credit of another must still be signed by the person to be charged. The Court below considered themselves "bound to hold that in an ordinary case of principal and agent a written representation within s. 6 of 9 Geo. 4, c. 14, signed by an agent alone, would not be binding on the principal, although such signature was duly authorized by him;" but they decided that the signature of Goddard, signing, as he did, as manager for the banking company, was in fact the signature, not merely of an agent, but of the banking company itself, and therefore the signature of the party to be charged within the meaning of s. 6. Goddard, however, was not the manager of the bank; there are fifteen branch banks, of which the branch at Cheltenham is one; if the judgment of the Court below is right, the fifteen managers of the branch banks can bind the banking company. But they are not the agents, to bind the banking company by representation of other persons; the information given by Goddard is given in his individual capacity, and of his own personal knowledge. [He was then stopped.]

Sir Henry James, A.G. (*Jeune* with him), for the defendant Goddard, admitted that Goddard was liable personally.

(1) 2 Bing. N. C. 776.

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Day, Q.C. (*Edward Clarke* with him), for the plaintiff. There can be no doubt that a corporation is liable to an action of tort, and *Barwick* v. *English Joint Stock Bank* (1) is an express authority that a corporation is liable for the fraudulent misrepresentation of their manager. What Goddard has done in this case is no less within the scope of his authority as manager than the giving of the guarantee was in that case.

[LORD COLERIDGE, C.J. What the plaintiff wanted there was the guarantee of the bank; what the plaintiff wants here is, not the information of the bank, but the information of the manager, who alone knew the fact inquired for.]

The jury have found that it was within the scope of the authority of the manager of the banking company to answer inquiries, not merely in his individual capacity, but as the representative of the banking company whose manager he was. The bank has no common organ. The public officer is created only to sue and be sued. The bank can only act through its agents. Goddard is the agent acting within the limits of his authority, conducting the ordinary business of the bank, and answering all inquiries on behalf of the bank; he is an agent for the purpose of binding the bank within the limits of his authority, and each of the fifteen managers are agents of the bank within their particular districts. The inquiry is made of Goddard because, as manager, he possessed the information, and he answers the inquiry as manager. It is contended that the plaintiff cannot recover, as the signature of Goddard, being the signature of an agent, is insufficient. To this there are two answers: 1. The signature of an agent is sufficient; and, 2. The signature of Goddard is the signature of the bank. The object of 9 Geo. 4, c. 14, s. 6, was that the representation should be made in writing; the word "agent" does not occur in s. 6. *Hyde* v. *Johnson* (2) is a decision on s. 1, and the legislature have, by 19 & 20 Vict. c. 97, rendered that decision nugatory. There is no such decision on s. 6, and therefore the legislature have left that section untouched. The maxim, "Qui facit per alium facit per se," applies to that section, and the signature of an agent is sufficient: *Reg.* v. *Justices of Kent.* (3)

(1) Law Rep. 2 Ex. 259. (2) 2 Bing. N. C. 776.
(3) Law Rep. 8 Q. B. 305.

[GROVE, J., referred to *Williams* v. *Mason*. (1)]

Secondly, the signature of Goddard is the signature of the bank. It is the only mode the co-partnership has of signing. It cannot act except through its officials. It is a quasi corporation. Can it be said that if the manager, the directors, and the sub-managers all signed, the partners would not be liable? The representation has been signed in the only possible way it can be signed. If Goddard is not an agent, he is the instrument of the bank for the purpose of signing; his is, as it were, the pen by which the bank signs.

Benjamin, Q.C., was not heard in reply.

LORD COLERIDGE, C.J. This is an appeal from a judgment of the Court of Queen's Bench, in which the facts material for our decision are as follows:—It is an action brought by the plaintiff, who had supplied Sir William Russell with a quantity of rails, and who had lost the money which he had expected to get in payment of those rails. The action was brought against the Gloucestershire Banking Company, in the name of its public officer, and against Goddard, who is the manager of a branch of the Gloucestershire Bank at Cheltenham, for a misrepresentation alleged to have been made by them as to the means of Sir William Russell, whereby the plaintiff was induced to part with his rails, and did not get the money he ought to have had for them. It was sought to bring the matter home to the Gloucestershire Banking Company in this wise. The Gloucestershire Banking Company are a co-partnership, and they have to sue and be sued by a public officer, and in this case first Mr. Winterbotham, and afterwards Mr. Jewsbury, are sued by the plaintiff as representing them. They are sought to be fixed in this way: Mr. Goddard, who is sued personally, was the manager of one of the fifteen branch banks of the Gloucestershire Banking Company, established at Cheltenham, and at this branch Sir William Russell used to bank, and the manager of the Cheltenham branch of the Gloucestershire Banking Company was a person who might be supposed to have, and probably had, the means of knowing the condition of the money matters of Sir William Russell. The plaintiff banked with the Sheffield and Hallamshire Bank, and he applied to the Sheffield

(1) 28 L. T. (N.S.) 232.

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and Hallamshire Bank before he dealt with Sir William Russell, to ascertain, if possible, the credit of Sir William Russell; and the manager of the Sheffield and Hallamshire Bank, a person of the name of Wells—a sub-manager—writes a letter of the 8th of November, 1869, in these terms:—"I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing of Sir William Russell, Bart., M.P. for Norwich, and whether you consider him responsible to the extent of 50,000*l.*—I am, Sir, yours faithfully, Hy. Wells, sub-manager." This is directed to the manager of the Gloucestershire Banking Company, Cheltenham. It ought to be observed here, in passing, that the liability as to which the plaintiff was interested was a liability very much less than 50,000*l.*, and was a sum of only 2937*l.* In answer to that the defendant Goddard wrote and sent to the manager of the Sheffield and Hallamshire Bank this letter, addressed to the "Sheffield and Hallamshire Bank, Sheffield," and dated "Gloucestershire Banking Company, Cheltenham, 9th November, 1869":—"Gentlemen,—I am in receipt of your favour of the 8th inst., and beg to say in reply that Sir William Russell, Bart., M.P. for Norwich, is the Lord of the Manor of Charlton Kings, near this town, with a rent-roll, I am told, of over 7000*l.* per annum, the receipt of which is in his own hands, and has large expectancies; and I do not believe he would incur the liability you name unless he was certain to meet the engagement.—I am, Gentlemen, yours faithfully, T. B. Goddard, manager." Then a bill, accepted by Sir William Russell, which is taken by the plaintiff in payment of the rails, is dishonoured, and the plaintiff loses his money.

The paragraph of the case which was pressed upon us as the important paragraph upon which the right of the plaintiff to recover could be sustained was paragraph 17. [The Lord Chief Justice read paragraph 17, the direction of Cockburn, C.J., to the jury, and the questions for the Court of appeal.]

The argument on behalf of the banking company is, that this is an action within s. 6 of 9 Geo. 4, c. 14, which enacts that—"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purport that such

other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith." Mr. Benjamin says this representation is in writing, not signed by the party charged therewith, as indeed it is not, because, so far as the banking company is concerned, when it is signed by Goddard it is not signed as a matter of fact by the party to be charged therewith; and Mr. Benjamin says nothing else will do. The words of the statute are express, and the argument that the signature of any one but the party to be charged therewith will not be sufficient is confirmed by the fact that when the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) came to be passed, s. 13 of that Act provides that with respect to ss. 1 and 8 of 9 Geo. 4, c. 14,—"an acknowledgment or promise made or contained by or in writing signed by an agent of the party chargeable thereby, and duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself." And it is argued that that is strong to shew, when the legislature were dealing with 9 Geo. 4, and had before them certain decisions, the authority of which they were wishing either to impeach or to confirm, they thought it right that with regard to other sections the signature of the agent should be the same as the signature of the principal, if the agent was duly authorized; and they expressly so enact that with regard to two of the sections of 9 Geo. 4, c. 14, and they expressly refrain from enacting that with regard to s. 6, upon which this action is brought. Therefore, says the learned counsel, that is in truth a legislative declaration, that whereas it was necessary to interfere with regard to ss. 1 and 8, it was not necessary to interfere in regard to s. 6, because s. 6 stood on its own grounds and was sufficient as it stood. It may be remarked further, that there is very good ground antecedently for the observation, because the subject of s. 6 is the charging of a person for an act of fraud, and it may well be—and, without diving very deep for motives, one cannot help seeing that there was an excellent motive for that enactment—that a person should not be proved fraudulent without the matter which is the evidence of his fraud resting on his own signature to a document to be produced,—that it should not rest, as before that time it might have

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rested, on the conflict of evidence as to oral communications. If you mean to charge a person with a fraudulent act, whereby you have been damnified in respect of the conduct of another, you shall not charge that person unless you can produce his own handwriting for the statement of fraud by which you say you have been misled. Whether, therefore, one looks to the antecedent reason of the thing, or whether one looks to what may be called parliamentary exposition of the statute, upon both grounds it seems to me that the true construction is the one which has been contended for by Mr. Benjamin, namely, if you want to charge a person under s. 6 of 9 Geo. 4, c. 14, you must produce the document upon which you propose to charge him, signed by the hand of the person whom you seek to charge.

The case does not rest there, because there is distinct authority, and authority of a very cogent kind, for so construing the statute. It is admitted that there have been decisions, such as *Hyde* v. *Johnson* (1), which have determined that there must be the signature of the person to be charged. All those cases came under review in *Williams* v. *Mason* (2), with which my Brother Grove has furnished us, in which one partner, who had ratified a fraudulent representation signed by another partner, was held not to be liable in an action because the person who had signed, had signed not the name of the defendant, but had signed the partnership name, and the document did not fulfil or come within the conditions laid down in s. 6 of 9 Geo. 4, c. 14. This decision does not at all conflict with the case of *Barwick* v. *London Joint Stock Bank* (3), and cases of that description which have been brought before us, because I apprehend that there can be no doubt that a different set of principles altogether arises where an agent of a joint stock company, in conducting the business of the joint stock company, does something of which the joint stock company take advantage, and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act. Justice points out, and authority supports justice in maintaining, that where a corporation takes advantage of the fraud of their agent, they cannot afterwards repudiate the agency

(1) 2 Bing. N. C. 776. (2) 28 L. T. (N.S.) 232.
(3) Law Rep. 2 Ex. 259.

and say that the act which has been done by the agent is not an act for which they are liable. If parliament should so enact, well and good, but parliament not having so enacted, the Courts have held what seems to me, if I may venture to say so, exceeding good sense as well as justice, and which in no manner conflicts with the judgment I am pronouncing to-day. Therefore, whether one looks at the strict construction of the statute, or at the interpretation which the statute may derive from antecedent reasoning, or from subsequent parliamentary legislation, or from the authority, not only of one Court, but of several Courts before this case was brought to appeal here, it seems to me that the reason, the construction, and the authorities are all one way, namely, that in this case the bank cannot be made liable, because the document on which they are sought to be made liable does not come within the statutory terms under which alone they can be liable.

But there is another ground upon which, it appears to me, that this case may be very properly determined in favour of the defendants, apart from the general construction, upon which I have not thought it right to shrink from expressing my opinion. Apart from the general construction upon the facts of this case, and upon the language of the documents themselves, there was neither any intention to consult the bank, nor was the answer the answer of the bank. In point of fact, the application is not made to the Gloucestershire Banking Company, but to a manager of the Gloucestershire Banking Company. The answer is not the answer of the bank, but is an answer in the first person; it is not a representation of the bank at all, but is a representation made by Goddard (who, no doubt, was in fact the manager of the branch bank at Cheltenham) as to certain matters which were within his personal knowledge, and as to which, whether they were true or whether they were false, he was pledging his personal knowledge to the person who made the inquiries of him. The answer is: "I beg to say, in reply, that Sir William Russell, Bart., M.P., is the Lord of the Manor of Charlton Kings, near this town,"—a thing which he, as a Cheltenham man, would know—"with a rent-roll, I am told, of over 7000*l.* per annum,"—that is, giving the inquirer the benefit of that hearsay which he himself had received—"and I do not believe he would incur the liability unless he was certain

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to meet the engagement"—shewing throughout the whole matter that he is applied to and he is answering as an individual person who, no doubt, because he is manager, and being manager, has peculiar means of information to which the people of the Hallamshire Bank very reasonably had recourse. That is a very different thing from giving an answer which could purport or be understood in any way to bind the bank whose manager he was, if the bank could be bound in point of law. Supposing, instead of the man being the manager of the Gloucestershire Bank at Cheltenham, he had ceased to be the manager for twenty-four hours, the inquiry might just as well have been addressed to him, and the answer might just as well have been made by him, and would have been of exactly the same value; all the knowledge that he had as manager he would have had as ex-manager; and supposing him to be an honest man, and to have intended to tell the truth, all the information that he could convey would have been just as valuable twenty-four hours after he ceased to fill the situation as it was twenty-four hours before, when he happened to fill it. I say that merely for the purpose of illustrating that there is a very great difference between applying to a man for a question to be answered who happens to fill or chances to fill a particular capacity, and applying to him in that particular capacity, and asking him in that capacity to answer a question because he fills a position he may have certain means of knowledge to which it is exceedingly reasonable that recourse should be had. I am of opinion, not only upon the general ground, but upon the particular facts of this case, that there is no pretence for saying that he was either applied to as the bank, or that he answered as the bank. If there could be any such contention, Mr. Day would have distinguished between what he calls a living instrument and an agent. He has made no such distinction, nor can he make any such distinction. An instrument is one thing, but a living instrument is an agent; and this manager, Goddard, was not the mere instrument in the sense in which a pen is the instrument in the hand that writes; but he was a living instrument in the sense of an agent, and if he was an agent, then, on the grounds I have already stated, he was not the principal, and could not make those who were his principals liable as such. In fact, as I understand

the judgment of the Court below, they did not say that he was the agent; they say, in some strange way, he was the bank itself. I confess, with the greatest possible respect for the judges of the Queen's Bench, I am unable to understand in what sense a man can be something that is neither principal nor agent. He is not the principal with regard to the bank, and he is not agent for the reasons that I have already given.

I am of opinion that a different conclusion must be arrived at with regard to Goddard, and that, at all events, with regard to Goddard, he has signed this—is found by the jury to have signed it, with a knowledge that it was untrue, and with a distinct intention to mislead those, whoever they were, to whose knowledge that misrepresentation should come. The plaintiff is a person to whose knowledge it has come, and upon him it has acted unfavourably to the extent of the loss of his money. Therefore it appears to me clearly, as far as Goddard is concerned, the action can be maintained for the whole sum that the plaintiff has lost, and that as against Goddard the plaintiff would be entitled to retain the verdict.

The judgment of the Court below must be reversed as far as the bank is concerned, but must be affirmed as far as the original liability of Goddard is concerned.

BRAMWELL, B. I am of the same opinion. No doubt there are cases in which a man may be charged with having committed a fraud when he has not committed it himself; but I think that that ought to be held in as few cases as possible, and clearly not in this case, because in this case, to my mind, the inquiry is not made of the bank, but is made of the individual. It is true that the jury have found that it was within the scope of the manager's authority to give the information asked for, and if the manager were to refuse to give it he would be doing a wrong to the bank which employed him, because he would be refusing a courtesy which it was their habit to shew, in order that a corresponding courtesy might be shewn to them; but in no other sense was it his duty or within the scope of his authority to do it. He had permission to do it and ought to do it, but the application is made to him individually, and his individual knowledge of the matter is trusted. If it had turned out that some other manager of the

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bank had known Sir William Russell not to be a solvent man, but that Goddard innocently made the statement he did, it could not have been said that there was any fraud in Goddard, or in the bank, because somebody in the bank knew that Sir William Russell was insolvent, or even if the head manager or the whole of the shareholders knew it. The inquiry is made of Goddard as to his personal knowledge, and it is he who is trusted in the answer to that inquiry. I think that alone ought to dispose of the case; but I am further of opinion that the statute has imposed an insuperable difficulty in the way of the plaintiff recovering. In my opinion the effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means unless he puts it down in writing, and acknowledges his responsibility for it by his own signature. He is neither to have the words proved by word of mouth, nor the authority given to an agent for whose act it is sought to make him responsible proved by word of mouth. It seems to me that Mr. Day's argument is, that there must be a sort of exception put in the statute to meet the necessity of the case. If this were a necessary thing for the purpose of the banking company carrying on their business, it might be otherwise; but it is not a necessary thing for the purpose of carrying on their business, it is no part of their business, it is a thing which can be done, and it is done, by bankers and their officers individually and personally; therefore there is no such necessity as Mr. Day's proposition would assume.

With respect to Goddard, I agree that the judgment must be against him. He has made a false representation with reference to the character of another person, with the intent that such person should obtain credit by it, and he has made it in writing; he has signed the document, therefore he has committed a fraud, and his case is brought within the words of the Act of Parliament.

PIGOTT and CLEASBY, BB., and GROVE and DENMAN, JJ., concurred.

Judgment reversed as to defendant Jewsbury, and affirmed as to defendant Goddard.

Attorneys for plaintiff: *Harper & Co.*

Attorneys for defendants: *Waterhouse & Winterbotham.*

[IN THE EXCHEQUER CHAMBER.]

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Feb. 10.

THE QUEEN ON THE PROSECUTION OF THE PUBLIC WORKS LOAN COMMISSIONERS *v.* THE CHURCHWARDENS OF ALL SAINTS, WIGAN, AND OTHERS.

Public Works Loan—Loan for repairing Church—5 Geo. 4, c. 36, ss. 1, 2—Rate after Lapse of Twenty Years.

By 5 Geo. 4, c. 36, s. 1, the churchwardens and overseers of any parish are empowered (with certain consents first obtained) to borrow money of the Public Works Loan Commissioners for the purpose of enlarging, repairing, &c., the parish church, and from time to time to make such half-yearly or annual rates for the repayment of the loan in such proportions and at such times as shall be directed by the commissioners, and to assign the rates so to be made as a security for the repayment of the loan in such manner as the commissioners shall appoint, and so as to secure the repayment of the principal, with interest at 4 per cent. per annum, by annual or half-yearly instalments within the period of twenty years at furthest from the advancing of the loan. By s. 2, the rates are to be made and levied and enforced in the same way as church rates.

In 1849 the churchwardens and overseers of W. duly borrowed 454*0l.* to repair their church, and by indenture, which recited that the commissioners had directed them to make annual or other rates to secure the repayment, they assigned to the secretary of the commissioners all the rates which shall from time to time be made pursuant to the direction of the commissioners, or which may be otherwise made under the provisions of the said Act; with a proviso that if the churchwardens, &c., for the time being should repay the principal sum by yearly instalments of 22*7l.*, together with the interest due, then the assignment should be void. Four yearly instalments, with interest, were paid up to 1853. The commissioners demanded payment afterwards, but no payment was made, nor any steps taken by the commissioners till 1871, after the twenty years had elapsed; and they then obtained leave to issue a mandamus to the churchwardens and overseers to make a rate to pay the instalment and interest due in 1854. On a return to the mandamus shewing the above facts:—

Held (reversing the judgment of the Court of Queen's Bench), that, after the lapse of twenty years, the statute expressly and impliedly forbad the making of the rate, to enforce the making of which the mandamus had been issued; that the defendants were therefore entitled to judgment.

ERROR by the defendants from a judgment of the Court of Queen's Bench on demurrer to returns to a mandamus.

The mandamus was addressed to the churchwardens of the parish of All Saints, Wigan, and the overseers of the township of Wigan, the township of Abram, and of the other townships

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making up the parish of Wigan, and was dated the 15th of December, 1871 (34 Vict.).

It recited the statute 5 Geo. 4, c. 36, ss. 1, 2, which are as follows:—

Sect. 1. That from and after the passing of this Act it shall and may be lawful for the churchwardens or chapelwardens and overseers of the poor of any parish in England or Wales, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor in vestry assembled, or where any parish shall be under the care and management of any select vestry or other select body, then with the consent of not less than four-fifths of such select vestry or other select body, by whatever name the same may be called, and with the consent of the bishop of the diocese and the incumbent of such parish, to make application to the commissioners authorized and empowered to make advances for public works under the provisions of the said recited Acts, for any loan or advance under the powers, authorities, provisions, and regulations of the said Acts and this Act, of such sum or sums in exchequer bills or money as shall be necessary for defraying the expenses, or any part of the expense, of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish, or of any district or division thereof, respectively; and if such commissioners shall think fit to entertain such application, and shall be satisfied that such consent, as required by this said Act, had been given and obtained, it shall and may be lawful for such commissioners, and they are hereby authorized and empowered to make and grant any such loan or advance for the purposes aforesaid in such manner as such commissioners are empowered to make any loan or advance under the authority of the said recited Acts or any of them; and it shall be lawful for such churchwardens or chapelwardens, together with the overseers of the poor of or for any such parish with respect to which such application shall be made and granted, to receive the sum or sums so advanced, and to apply the same for the purposes mentioned in such application; and from and after the grant of any such loan or advance it shall be lawful for the churchwardens or chapelwardens and the overseers of the poor of the parish in respect of which such loan or loans shall be advanced as aforesaid, and their successors from time to time for the time being, and they are hereby authorized and required to make such annual or half-yearly rates for the repayment of the sums so advanced, in such proportions and at such times as shall be directed and appointed by the said commissioners on that behalf, and to assign the rates so to be made as aforesaid as a security for the repayment of the sums so advanced, in such manner and form as the said commissioners shall direct and appoint, and so as to secure the repayment of all sums so advanced, with interest thereon at and after the rate of 4*l.* per cent. per annum, by annual or half-yearly instalments on the amount of the principal money advanced, within the period of twenty years at furthest from the advancing of any such sums respectively.

Sect. 2. That it shall be lawful for any churchwarden or chapelwarden or overseer of or in any parish or district, or division of any parish, in which any rates shall be made under the provisions of this Act, to collect, demand, and receive, sue for, levy, and recover, all such rates by all such ways and means as any church rates may by law be collected, demanded, received, sued for, levied,

and recovered, as fully and effectually as if all powers, authorities, provisions, penalties, and forfeitures relating to the collecting, demanding, suing for, levying, receiving, and recovering of any church rates, or relating to any refusal to pay any like rates, were specially repeated and enacted in this Act, any law, statute, usage, or custom to the contrary notwithstanding.

The writ then recited 19 & 20 Vict. c. 104, ss. 1, 2, an Act to extend the provisions of 6 & 7 Vict. c. 37, for making better provision for the spiritual care of populous parishes, and further to provide for the formation and endowment of separate and distinct parishes; and 31 & 32 Vict. c. 109, s. 3, enacting that, in any parish where a sum of money was due at the passing of the Act on the security of church rates, or rates in the nature of church rates, to be levied in such parish by virtue of any Act of Parliament, such rates may still be made and levied and enforced for the paying off of the money so due. That before the 17th of September, 1849, several ecclesiastical districts were formed within the ancient parish of Wigan (which had previously comprised twelve townships) under the statutes in that behalf; and that on the 10th of August, 1849, the churchwardens of the parish of Wigan, and all the overseers of the poor of the said several townships, in pursuance of 5 Geo. 4, c. 36, with the consents thereby required, applied to the Public Works Loan Commissioners for a loan of 4540*l.* for repairing and in part rebuilding and restoring the church of the parish, which sum the commissioners granted on the 30th of August, 1849, and was received by the churchwardens and overseers; and that for the purpose of securing the repayment, with interest at 4 per cent. per annum, an indenture dated the 17th of September, 1849, was duly made and executed between the said churchwardens and all of the said overseers of the one part, and J. S. Brickwood, the then secretary to the commissioners, of the other part.

The writ then set out the indenture of which the following are the material parts:—

The indenture recited at length ss. 1, 2, of 5 Geo. 4, c. 36, and 9 & 10 Vict. c. 83, by which all the enactments of 5 Geo. 4, c. 36, were made to extend to 9 & 10 Vict. c. 83; the indenture then recited the necessary consents, &c., on the application for the loan and the consent of the commissioners to grant the loan "upon having the repayment thereof with interest, in such proportions

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and times as hereinafter mentioned, secured by annual or other rates, to be from time to time for that purpose made by the churchwardens and overseers of the said parish for the time being, when and as occasion shall require, for the due payment of such instalments of principal and interest, and which rates the said churchwardens and overseers have been and are hereby directed and appointed by the said commissioners to make and levy accordingly, and by such assignment of the same rates as is hereinafter contained." And it was then witnessed that in consideration of the loan the churchwardens and overseers, in pursuance of the aforesaid Acts, for themselves and their successors, assigned to J. S. Brickwood "all and every the annual or other rates which shall from time to time be made in the said parish of Wigan under or in pursuance of such direction or appointment as aforesaid, or which may be otherwise made under or by virtue of the provisions of the said Act of 5 Geo. 4, c. 36, and all and every sum and sums of money accruing and payable, or which shall be or may at any time or times hereinafter accrue, become payable, or be made, levied, collected, or received in the said parish, from or in respect thereof. To have, hold, receive, and take the said rates, &c., unto or by the said J. S. Brickwood, his successors and assigns," subject to the following proviso: "that if the said churchwardens and overseers, or other the churchwardens and overseers for the time being, do, on the 17th of September next, and on every succeeding 17th of September, until the whole of the principal moneys received be paid off, pay to the cashiers of the Bank of England for the use of Her Majesty, her heirs or successors, interest at the rate of 4 per cent. per annum on the said sum of 4540*l.*, and the further sum of 227*l.* in or towards the discharge of the said principal sum of 4540*l.*, until the whole of the said principal sum of 4540*l.* and the interest thereof shall be discharged, then and in that case, or on any other acceptance of the said sum of 4540*l.* and the interest thereof by or under the order or direction of the said commissioners, the assignment hereby made shall become absolutely void."

The writ then recited that of the instalments of principal made payable yearly by the above indenture, four only, amounting to 908*l.*, were paid, with interest thereon, up to the 17th of September, 1853, by means of general church rates levied by the churchwardens of

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the parish of Wigan over the whole parish, including the said townships and districts; and that no further payments had been made of either principal or interest, notwithstanding that applications for payment of the instalments had been made from time to time, and that the instalments remaining unpaid amounted to 4851*l.* 15*s.* 10*d.* for principal and interest up to the 17th of September, 1866, and that no rate or assessment had been made by the churchwardens or overseers towards the payment of the arrears, notwithstanding repeated request.

The writ then commanded the churchwardens and overseers, and each of them, to make, and levy and collect a rate pursuant to 5 Geo. 4, c. 36, for the payment of 227*l.*, one year's instalment due on the 17th of September, 1854, of the said loan, and 145*l.* 5*s.* 7*d.* one year's interest at 4 per cent. on 3632*l.*, the unpaid balance of the loan, &c.

The churchwardens of the parish of All Saints, Wigan, and the overseers of the township of Wigan and some other townships returned: 1. That the sum to be levied is for the year 1854, and they cannot make, nor ought they to be compelled to make, a rate for the levying of that amount. 2. That at the time of the making of the indenture the church rates were made and levied over the whole area of the parish, and those rates only were assigned, and that since the indenture was made certain districts have been separated and become separate parishes under divers Acts of Parliament. 3. That twenty years was the limit within which the loan was to be repaid, and more than twenty years had elapsed before the date of the writ, and therefore that no rate can or ought to be made or levied for the purpose.

The overseers of the township of Abram and of some other townships made a similar return.

The overseers of the township of Billinge Higher End made a similar return, with the addition of the allegation that no demand had ever been made by the commissioners for any amount except only the amount of principal and interest in the writ mentioned, or for any rate to be made except only a rate to levy that and no other amount, and that that demand was only made in 1865; and also that certain townships had become separate ecclesiastical districts before the date of the loan and the making of the indenture.

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[The judgment of the Court renders it unnecessary to give the points raised by the returns more in detail.]

To the several returns there were demurrers and joinder.

The Court of Queen's Bench, in Trinity Term, 1872, gave judgment that the demurrers were invalid, and awarded a peremptory writ of mandamus.

Nov. 26, 27, 1873. *Manisty, Q.C.* (*Fitzadam* with him), for the defendants, the overseers of the township of Abram, &c.

Field, Q.C. (*Barstow* with him), for the churchwardens of All Saints, Wigan, and the overseers of the township of Wigan, &c.

Cowie, for the prosecution.

The following cases were cited: For the defendants: *Rex* v. *Dursley* (1); *Rex* v. *St. Michael, Pembroke* (2); *Rex* v. *Carpenter* (3); *Reg.* v. *St. Michael, Southampton* (4); *Piggott* v. *Bearblock* (5); *Cortis* v. *Kent Waterworks Co.* (6); *Woods* v. *Reed* (7); *Burland* v. *Hull Local Board of Health* (8); *Reg.* v. *Hurstbourne Tarrant* (9); *Waddington* v. *London Union.* (10) For the prosecution: *Smallbones* v. *Edney* (11); *Harrison* v. *Stickney* (12); *Worthington* v. *Hulton* (13); *Ward* v. *Lowndes* (14); *Rex* v. *St. Mary, Lambeth.* (15).

Cur. adv. vult.

Feb. 10. The judgment of the Court (Lord Coleridge, C.J., Bramwell and Cleasby, BB., Keating, Grove, and Denman, JJ.) was delivered by

LORD COLERIDGE, C.J. This is a proceeding in which the Public Works Loan Commissioners are attempting, by a mandamus issued in the year 1871, to enforce against the present churchwardens of Wigan the repayment to them of the balance of a

(1) 5 A. & E. 10.
(2) 5 A. & E. 603.
(3) 6 A. & E. 794.
(4) 6 E. & B. 807; 25 L. J. (Q.B.) 379.
(5) 4 Moo. P. C. 399.
(6) 7 B. & C. 314, 341.
(7) 2 M. & W. 777.
(8) 3 B. & S. 271; 32 L. J. (Q.B.) 17.
(9) E. B. & E. 246; 27 L. J. (M.C.) 214.
(10) E. B. & E. 370; 28 L. J. (M.C.) 113.
(11) Law Rep. 3 P. C. 444.
(12) 2 H. L. C. 108, 125.
(13) Law Rep. 1 Q. B. 63.
(14) 1 E. & E. 940, 956; 29 L. J. (Q.B.) 40.
(15) 3 B. & Ad. 651.

sum of 4540*l.*, advanced by them to the then churchwardens of Wigan in September, 1849. The money was originally advanced under the powers of 5 Geo. 4, c. 36, s. 1; and the repayment was secured by a deed, by which the commissioners directed the making of certain annual or other rates, and the churchwardens assigned the said rates each respectively on the terms of the Act of Parliament. Four annual instalments were paid, amounting altogether to 908*l.*, the last instalment having been paid on the 17th of September, 1853. Nothing has been since paid. The mandamus has been issued to compel the payment of an annual instalment of 227*l.*, which was due on the 17th of September, 1854, and 145*l.* 5*s.* 7*d.*, one year's interest at 4 per cent. on the unpaid balance of the loan. Various changes and divisions have taken place under various Acts of Parliament in the parish of Wigan since 1854; but it was considered, and we think rightly, that those made no substantial difference in the question to be determined; and we content ourselves, therefore, with mentioning the fact in general without pursuing it further in detail.

We are unfortunately not in possession of the reasons which led the Court of Queen's Bench to issue the mandamus. The Court appears to have given judgment upon the return without much argument, having, as we understand, heard the rule very fully argued before the writ was issued, and given judgment upon the return in accordance with the opinion they had previously intimated; and the Court of Queen's Bench, supposing it to be a matter of discretion, do not state that they have in fact exercised that discretion upon the particular circumstances of this case, or whether they were of opinion that the commissioners were entitled to the writ ex debito justitiæ, and that no question of discretion arose. In this state of things the matter comes before us; and the question is, whether this peremptory writ of mandamus shall or shall not issue.

By the terms on which the money was advanced, the commissioners were to be repaid in twenty years, by annual payments, the funds for which were to be procured by rates made yearly or half-yearly. This was the bargain in accordance with the statute. The commissioners had no right to assent to earlier payment; they had no power to postpone the time of payment of the whole or any

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instalment. No agreement with the parish could make such a postponement lawful. They had no right, therefore, according to the strict words of the statute, directly or indirectly, to two annual payments in one year, nor to any payment after the twenty years, nor to the making of any rate other than those as agreed for. In this case it should be noticed that the amount is not made a charge upon the church rates, or any known fund of a similar description, as in the two cases referred to in the argument of *Reg.* v. *St. Michael, Southampton* (1) and *Reg.* v. *Hurstbourne Tarrant.* (2) We have only an enactment that it shall be repaid by the means specified. It is true, as Mr. Cowie pointed out, that in the deed the words "or which may otherwise be made" are used as to rates, with what object does not appear. But the phrase would be satisfied by quarterly rates, or by rates not made precisely half-yearly, but, say, at intervals of four or eight months in the twelve. The commissioners have no right except to annual payments, the funds for which were to be provided in the year preceding the day of payment. They now say that they are entitled to sixteen instalments at once, the funds to be raised by rate or rates to be forthwith made, many years after the first instalment became due, and some years after the last did so. The present mandamus, indeed, is in respect of one instalment only, but it is claimed on reasoning which, if good for that one, is good for the whole sixteen; and, indeed, at first the claim was for a rate or rates to raise funds for the whole balance unpaid. It is clear from what has been said that they are not entitled to this by virtue of the bargain at the time of the advance; if entitled to it at all, it is on some other ground. It must be some right, if any, resulting from the contract and what has followed on it—in fact, resulting from this, that the parish, with the sufferance of the commissioners, has not paid. It remains to consider if there is any such right.

As already pointed out, the commissioners had a right to require that such rates as agreed for should be made. If the churchwardens and overseers failed to make them, they would probably have been liable to a proceeding in the nature of an action for

(1) 6 E. & B. 807; 25 L. J. (Q.B.) 379.
(2) E. B. & E. 246; 27 L. J. (M.C.) 214.

breach of duty in not making the rate. But the commissioners could not, in our opinion, have been confined to this personal remedy. Default or not in the overseers, yet if the rate proved insufficient, or could not be collected, or was embezzled by the collector, the commissioners would have been entitled to compel, by mandamus, the parish which by its officers had made default in making, collecting, or handing over a rate, to pay and make a rate for payment. It is true that the persons subject to such rate would be, as to some individuals, different from those who would have been subject to the rate which ought to have been made. That is matter which could not have been helped from the nature of the case. But the present proceeding is not that or anything like it; it is a demand on the present inhabitants to pay a debt which ought to have been paid by others; not to make good their own defaults, but those of other people; to make rates now, not to provide for instalments becoming due, but for instalments due long ago, and suffered by the commissioners to remain unpaid. It is said in answer to this, that if the commissioners might come six months after default, they may come after twenty years; and that the only question would be in each case, have they come in a reasonable time; and that that has been decided by the Queen's Bench conclusively. To this answer the following replies seem good and sufficient: There is nothing in the mandamus to shew that this rate is asked for upon and in consequence of the default of the parish, in such a way as that in which there might have been a right to ask for it. There is nothing shewn, save that the money has not been paid; and this it may be by consent of the commissioners, though indeed, some years ago they appear to have asked for it, but to have made no attempt to enforce compliance with their request by any legal measure. Had this been shewn, and if there was a question whether they had come in a reasonable time, calling on the parish, the same persons as near as might be, to make good their default, then if the right is discretionary the judgment of the Queen's Bench on the motion for the mandamus would be final. But no question of discretion of this nature arises in this case. The writ, no doubt, is a prerogative writ, and not of right. But it is a writ asked for to enforce a private right. The right is one which, but for the technical difficulties of suing, might

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be claimed in an action. How could a court of law refuse judgment for the plaintiffs on the ground that they had not come within a reasonable time, if they had a right to come at any time? The Queen's Bench exercises discretion as to granting the writ where it is sought to enforce a public, not a private right, or where there is another remedy, and from lapse of time or other reason that by mandamus is inconvenient. But on what ground can the Court refuse to enforce a right, barred by no statute of limitations, on the ground that there has been delay? None has been suggested, nor can we suggest one. Suppose the technical difficulty of maintaining an action of mandamus did not exist, and if such an action had been brought by the commissioners, there would have been no question of discretion in this Court. The commissioners would have to shew that they came at a proper time. Any averment to that effect might have been traversed, and must have been tried by the jury. And surely this case must have been decided on the same principles, although the writ asked is a prerogative writ. It must be remembered that there is here no other remedy; and to refuse this mandamus can only be on the ground that there is no right. If their not coming in a reasonable time causes the commissioners to lose their right, their coming in a reasonable time is a step in their title to the remedy, and whether they have come in a reasonable time or not is a question of fact, and this mandamus is bad for not averring that they had come in a reasonable time. It is very easy to understand why it is not averred. In *Reg.* v. *Stainforth Canal Co.* (1) and in *Reg.* v. *Leeds and Liverpool Canal Co.* (2), where the mandamus was refused because the application was late, there was another remedy. In another case decided in the Court of Queen's Bench the writ was refused because there was another remedy, and that by mandamus would have been oppressive: see *Norris* v. *Irish Land Co.* (3) As to the authorities on the subject of retrospective rating, it was admitted on all hands that the question depended on the particular statute and bargain in this case; but there can be no doubt that the rule or principle is that parishes are not to get into debt and leave succeeding inhabitants to pay what should have been paid by

(1) 1 M. & S. 32. (2) 11 A. & E. 316.
(3) 8 E. & B. 512; 27 L. J. (Q.B.) 115.

them. Lord Wensleydale, indeed, delivering, as Mr. Baron Parke, the unanimous opinion of the judges in *Harrison* v. *Stickney* (1), expresses himself as follows: "There is no rule of law which prohibits a retrospective rate. That depends upon the intention of the legislature; and the question is, whether the Act under which each rate is made does so expressly or impliedly." We have already explained why we think the Court below is not to be taken to have exercised its discretion in this case in any sense which would render it improper for us to review it; and we think that the terms of the Act of Parliament do in this case, in the words of Lord Wensleydale, both expressly and impliedly prohibit the making of the rate to enforce the making of which the mandamus has been issued. We are of opinion that the judgment must be reversed.

Judgment reversed.

Attorneys for the prosecution: *Barnes & Bernard.*

Attorneys for defendants, churchwardens of All Saints, Wigan: *Sharpe, Parkers, & Co., for Mayhew & Sons, Wigan.*

Attorneys for defendants, overseers of Abram: *Paterson, Snow, & Burney.*

(1) 2 H. L. C., at p. 125.

END OF HILARY TERM, 1874.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXXVII VICTORIA.

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April 20.

MACDONALD *v.* THE LAW UNION FIRE AND LIFE INSURANCE COMPANY.

Policy of Life Insurance—Proviso avoiding Policy if the Declaration on which the Assurance was effected is not "in every Respect true."

The plaintiff effected a policy of insurance with the defendants on the life of K. M. T., which was under the seal of the defendants, but the plaintiff was not made a party to it. In it was a proviso, "that if the declaration under the hand of the plaintiff delivered at the defendants' office as the basis of the insurance is not in every respect true, . . . then the insurance shall be void." On proposing the insurance, the plaintiff had answered in writing certain questions, and at the foot he had signed, as the person proposing the insurance, a declaration, "I declare that the above particulars are truly set forth":—

Held, that the proviso in the policy (by the terms of which the plaintiff was bound, having accepted it) avoided the insurance if the particulars in the declaration were untrue in fact, on a material matter, although not untrue to the plaintiff's knowledge.

DECLARATION on a policy of insurance [setting it out at length], dated the 9th of April, 1872, under the hands of three directors of the defendants' company, and under the seal of the company, effected with the defendants by the plaintiff on the life of K. M.

Taylor. After stating the amount insured, and of premium, &c., "Provided, nevertheless, that if the declaration in writing under the hand of the plaintiff, dated the 6th of March, 1872, delivered at this office as the basis for the insurance, is not in every respect true, or if there has been any misrepresentation, concealment, or untrue averment in treating for the insurance, or if the conditions herein contained shall not be in all respects observed and performed on the part of the plaintiff and K. M. Taylor, then the insurance shall be void and the premium or premiums received in respect thereof shall be forfeited to the company."

Pleas, inter alia, Fifth: that a material fact stated in the said declaration in the said policy mentioned, and thereby agreed to be the basis of the insurance, was untrue; that is to say, that the life of K. M. Taylor had not been proposed for insurance in any office or offices, whereas it had been proposed in two offices [naming them], and had been declined by both offices.

Issue joined.

At the trial before Blackburn, J., at the sittings in Middlesex after Hilary Term, it appeared in evidence that the plaintiff had effected with the defendants' office an insurance on the life of a Mrs. K. M. Taylor. On the plaintiff's proposal to insure the life at the defendants' office, a form containing questions to be answered by the person proposing the insurance was filled up by the plaintiff, and he signed at the foot of it, as the person proposing the insurance, the following declaration: "I declare that the above particulars are truly set forth." Question 10 was, "Has the life been proposed for insurance at this or any other office or offices; if so, at what offices; was she accepted or declined?" The answer was, "No." The policy declared on was afterwards granted by the defendants, and accepted by the plaintiff.

In answer to questions left by the judge, the jury found, inter alia, that the answer to question 10 was untrue to the knowledge of Mrs. Taylor, but not to the knowledge of the plaintiff. On this finding, the judge directed the verdict to be entered for the defendants on the fifth plea, with leave to move to enter it for the plaintiff; the verdict being entered for the plaintiff on the other issues, with leave to move to enter the verdict on those issues for the defendants.

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Powell, Q.C. (with him *Barnard*), for the plaintiff, moved accordingly. On the finding of the jury on the fifth plea the plaintiff is entitled to the verdict. There is nothing stated in the proposal or form of questions sent to the plaintiff to fill up to indicate that they are to be the basis of the contract.

[BLACKBURN, J. It is expressly so stated in the policy.]

Only inferentially. This proposal is not like that in many of the reported cases, which contains a distinct statement on the face of it that it is to form the basis of the contract. After the questions are set out, it simply says, "I declare that the above particulars are truly set forth."

[COCKBURN, C.J. But in the policy itself, which is the operative instrument and contains the terms of the contract, the declaration is said to be delivered as the basis of the insurance.]

The policy is the act and deed of the company exclusively; the plaintiff does not put his hand to it as he does to the other document; and the policy contains terms of which no notice was given to the plaintiff by the proposal. In the policy they do not recite that the particulars are the basis of the policy, but at the end there is a proviso that if the declaration delivered at the office as the basis of the insurance is not in every respect true, then the insurance is to be void.

[COCKBURN, C.J. The plaintiff accepts the policy with that proviso in it.]

That raises the point whether the mere acceptance of a policy such as this, without any previous stipulation or knowledge on the subject, makes the terms of it binding upon the plaintiff.

[BLACKBURN, J. Surely there can be no doubt of it. Is there any ground for saying that a party can accept and adopt a contract, although he has not put his hand to it, and then reject some of the terms of it? I did not reserve that. I thought the point whether the absolute truth was meant by the terms of the proviso very arguable, so I reserved that.]

The plaintiff, in accepting the policy, adopts it only so far as it is in conformity with his proposal. There have been cases in which the proposal itself had terms similar to those of this proviso, and yet the Courts held that in the absence of fraud the

terms did not avoid the policy. In *Wheelton* v. *Hardisty* (1) the Court of Exchequer Chamber, overruling this Court, held that there was no warranty of the truth of the particulars in the proposal, nor anything in the nature of the contract shewing an intention that the truth of those matters should be the basis of the contract.

[LUSH, J. It is to be observed that at the foot of the answers the plaintiff says, "I declare that the above particulars are truly set forth." He does not say, "to the best of my knowledge or belief." The declaration is without any qualification.]

No doubt; and if that be held a warranty of the truth, there is an end of the case; but it is submitted that it only amounts to a representation, and being bonâ fide, as the jury have found, the plaintiff is entitled to the verdict on the fifth plea. [He also referred to *Benham* v. *United, &c., Assurance Co.* (2)]

Sir J. B. Karslake, Q.C. (*Petheram* with him), moved, pursuant to leave reserved, to enter the verdict for the defendants on the other issues. As the Court refused the rule merely pro formâ, in order to put the defendants in a position to appeal, in case the plaintiff should take that course, it is unnecessary to give the pleadings, &c.

COCKBURN, C.J. We refuse the plaintiff a rule on the ground that it appears to us, upon the construction of the contract, that it is a condition that the declaration signed by the plaintiff shall be true in point of fact,—not merely in the sense of being true in the absence of fraud, that is, true as far as the plaintiff's knowledge went. It is the same thing to the company whether the representations contained in the declaration be fraudulent or whether they be not. The representation would have been fraudulent if the proposal for the insurance had been by the person whose life was to be insured, and the company, of course, under those circumstances, would be protected; but it is equally important to them to be protected when the insurance is effected by a third person. We must look at the language of the policy with a view to what was in the mind of those who drew it. The

(1) 8 E. & B. 232; 26 L. J. (Q.B.) 265; 27 L. J. (Q.B.) 241.
(2) 7 Ex. 744; 21 L. J. (Ex.) 317.

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object of the proviso is that the company shall be protected against untruthful representations, whether those representations are untrue to the knowledge of the party effecting the insurance or not; the terms would primâ facie and naturally import, in the ordinary use of language, that the policy is vitiated if the representation, made as preliminary to the contract, was not in point of fact true. Whether untrue to the knowledge of the party proposing the life is to them a matter of very little importance. The ordinary sense of the words used is that they are to be taken with reference to the fact, and not with reference to the knowledge of the party. This case is clearly distinguishable from *Wheelton* v. *Hardisty* (1), because in that case there was no condition that any untrue statement should vitiate the policy.

BLACKBURN, J. I also think that the verdict was rightly entered, upon the terms of this policy, in which there is this agreement: "Provided that if the declaration in writing under the hand of the plaintiff, delivered by him as the basis of the insurance, was not in every respect true, or if there had been any misrepresentation, concealment, or untrue averment, in treating for the said insurance, or if the conditions thereon indorsed should not be in all respects observed and performed on the part of the plaintiff, the policy should be void." That is the language put into the contract, and although it is under a deed poll, I think the proviso must be taken as part of the contract, and that the plaintiff cannot sue upon the contract which contains that proviso without being bound by it, and that he must take the contract with the proviso, and not reject it. I think, further, that the meaning and true construction of it is, that if the statement made by the plaintiff is not in every respect true in fact,—not in the sense if it be fraudulent or if it be a lie, or in the sense that there is moral culpability,—then the policy is to be void. The object being that the company may know what sort of risk they are taking, they secure themselves by saying, if the statements the insured have made are not accurate in fact, then the contract shall be void. Whether the premiums are forfeited would be a matter depending upon other considerations. In *Wheelton* v. *Hardisty* (1) the judg-

(1) 8 E. & B. 232; 26 L. J. (Q.B.) 265; 27 L. J. (Q.B.) 241.

ments of the judges all proceed on the ground that there was no express stipulation in the policy that made the accuracy of the statements the basis of the contract. Whether that was correct or not in the particular case, is a question that only can be raised in the House of Lords; but that that is the ratio of the decision is clear, when looking to the reasons given by the different judges. But here the proviso is expressly worded so as to make inaccuracy of the statements, as distinguished from wilful falsehood, avoid the contract. I think, therefore, that there should be no rule.

LUSH, J., concurred.

Rule refused. (1)

Attorney for plaintiff: *J. W. Macdonald.*
Attorney for defendants: *George Burges.*

COX AND ANOTHER *v.* LEIGH.

April 28.

*Sheriff—Landlord and Tenant—Payment of Rent, on Execution of Tenant's Goods—*8 *Anne, c.* 14, *ss.* 1, 6, 7.

The statute 8 Anne, c. 14, s. 1, only applies to subsisting tenancies; and the sheriff is not liable for removing goods taken in execution without first paying to the landlord a year's rent, where the tenancy has determined before the seizure, though within six months of it.

CASE stated by consent without pleadings.

1. The plaintiffs are the trustees for the Derby and Derbyshire Banking Company, and the defendant is the sheriff of Cheshire. The action was brought against the defendant as sheriff for the removal of goods taken in execution without paying to the plaintiffs half a year's rent, amounting to 125*l.*

2. George Underwood being possessed of the residue of a term of ninety-nine years in Ruby Hall, subject to a yearly rent, by an indenture of mortgage, on the 21st of March, 1868, mortgaged the messuage and tenement to the then trustees of the bank, and by the indenture Underwood became tenant from year to year to the mortgagees at a rent of 250*l.*; the mortgage became vested by mesne assignments in the present trustees, the plaintiffs.

(1) See *Duckett* v. *Williams* (2 C. & M. 348).

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The 250*l.* represented the 5 per cent. interest due on the advance of 5000*l.* for which the messuage and premises were held by the parties as security.

Underwood duly paid the yearly sum of 250*l.* to the persons entitled, and to the plaintiffs afterwards, to the 21st of September, 1871, and on the 21st of March, 1872, by a notice to quit before then given by the plaintiffs to Underwood, his tenancy to the plaintiffs, if any existed, in such messuage and premises expired.

3. On the 21st of March, 1872, there was due from Underwood to the plaintiffs, in respect of the yearly sum of 250*l.*, the sum of 125*l.* for the half-year ending on that day, and on the 26th of March, 1872, the plaintiffs issued a writ in an action of ejectment against Underwood, brought to recover the possession of the messuage and premises, and on the 9th of May, 1872, judgment was obtained, and the sheriff delivered possession to the plaintiffs on the 22nd of June, 1872.

4. An action was brought by J. Cash and another against Underwood, in the Court of Exchequer, and judgment was signed for the plaintiffs therein, and upon such judgment a writ of fieri facias was issued, and on the 27th of March, 1872, it was lodged with the defendant, as the sheriff of Cheshire, to be executed. By such writ of fieri facias the sheriff of Cheshire was commanded to levy of the goods and chattels of Underwood in his bailiwick 34*l.* 15*s.* 11*d.*, besides, &c., and the defendant, as such sheriff, by his officer, on the same day took goods and chattels of Underwood, then being in and upon the messuage and premises in the bailiwick, of the sheriff to answer the writ, and left a man in possession thereof under the writ of fieri facias; and another action was brought by Edward Gilbert against Underwood in the Court of Exchequer of Pleas, and judgment was signed for the plaintiff therein, and upon such judgment a writ of fieri facias was issued, and it was lodged with the defendant as such sheriff on the 11th of April, 1872, to be executed in like manner, to levy 61*l.* 15*s.* 2*d.*, besides, &c. And the defendant as such sheriff, by his officer, took, on the same day, the goods and chattels of Underwood then being in and upon the messuage and premises, to answer such last-mentioned writ, and left the same man in possession thereof under the two writs of fieri facias.

5. Before these executions were put in, and before the 21st of March, 1872, viz., on or about the 13th March, 1872, the Earl of Shrewsbury had seized a large part of the goods on the messuage and premises for arrears of rent due in respect of the premises, amounting to 220*l.* 10*s.* 4*d.*, being two and a half years of rent in arrear, which goods were sold by the Earl of Shrewsbury in June, 1872. The sheriff seized, for the purpose of satisfying the writs so lodged with him, the residue of the goods on the premises not seized by the Earl of Shrewsbury.

6. On the 12th of April, 1872, the plaintiffs caused a distress to be put in upon the goods and chattels of Underwood then being upon the messuage and premises, and which had been so seized and taken, and were then held possession of, under the writs of fieri facias, for the arrears of alleged rent due on the 21st of March preceding, and put and left a man in possession of the goods and chattels under the distress, and continued the man in possession of the goods with the man put in possession by the sheriff until the 16th of April then following. The defendant as such sheriff continued also to hold the goods and chattels under the writs of fieri facias before mentioned, and the goods and chattels so taken in execution and under the distress then were and continued to be in and upon the messuage and premises, and on the 16th of April the plaintiffs caused written notice to be given to the defendant as such sheriff that the alleged rent was so in arrear, and requested him not to remove the goods of Underwood then being taken by him in execution till the rent in arrear was paid, and thereupon the plaintiffs withdrew the man sent by them to take possession under the distress.

7. On the 16th of April, 1872, a certain other writ of fieri facias on a judgment for the plaintiff in a suit wherein W. W. Wynne was plaintiff and Underwood was the defendant, was lodged with the now defendant as such sheriff to levy of the goods and chattels of Underwood then being in and upon the messuage and premises the sum of 104*l.* 11*s.* 3*d.*, being the amount of such judgment with interest thereupon, and the now defendant, by his officer, on the same day took and held the goods and chattels henceforth under and by virtue of such writ, and on the 30th of April then following a certain other writ of fieri facias on a judgment for the plain-

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tiff, in an action wherein W. Ryalls was the plaintiff and Underwood was the defendant, was lodged with the now defendant for execution on the goods and chattels of Underwood then being in and upon the messuage and premises, and the now defendant on the same day took and held the same to satisfy the writ.

8. On the 9th of May, 1872, the plaintiffs obtained judgment in the action of ejectment referred to in paragraph 3, and possession of the messuage was awarded to be given in execution to them on the 1st of June then ensuing.

9. On the 4th of June, 1872, the defendant caused to be sold the goods and chattels of Underwood so as aforesaid seized by him, and the goods and chattels were removed from the messuage and premises and delivered to the respective purchasers thereof, and realised sufficient to pay the plantiffs, if they are entitled to priority as against the execution creditors.

10. After the sale of the goods and chattels of Underwood by the defendant there remained no further or other goods and chattels of Underwood on the messuage and premises to answer any distress by the plaintiffs or to meet the rent so in arrear.

11. The question for the opinion of the Court is, whether, under the circumstances above stated, the defendant could legally cause to be sold and removed, in pursuance of such sale, the goods and chattels in order to satisfy all the writs of execution, until the arrears of rent had been paid to the plaintiffs.

April 28. *Field, Q.C.* (*J. O. Griffits* with him), for the plaintiffs. The question is, whether, in order to entitle a landlord to be paid a year's rent under 8 Anne, c. 14, s. 1, there must be a subsisting tenancy. The whole scope of the statute of Anne is to protect the landlord's right of distress. At common law, when the tenancy determined, the landlord's right to distrain was at an end; and to remedy this grievance it is provided by ss. 5 and 6 that although the tenancy has expired, yet if six calendar months have not elapsed from its determination, and the landlord's title continues, and the tenant is still in possession of the premises, the landlord may distrain. All these circumstances concurring in the present case, the landlord, but for the execution levied on the tenant's goods, would have a right to distrain. Sect. 1 provides that no goods

shall be taken in execution unless the party at whose suit the execution is sued out shall pay to the landlord one year's rent. Looking at all the provisions of the statute, which is passed for the protection of the landlord, and giving it a liberal construction to carry out the intention of the legislature, whether the tenancy has expired or not, on an execution levied on the tenant's goods, the landlord is entitled to be paid a year's rent. No doubt, in Woodfall on Landlord and Tenant, p. 444, it is laid down: "The Act does not apply to rent due under a lease which has expired, or which has been determined by notice to quit, or by entry or ejectment for a forfeiture." But the authorities cited for this proposition do not support it. In *Riseley* v. *Ryle* (1) an objection was raised to the declaration on special demurrer, on the ground that it did not sufficiently shew that a tenancy in the premises subsisted; but the question was not decided, as leave was given to amend. In *Hodgson* v. *Gascoigne* (2) the facts shewed that more than six months had expired from the determination of the tenancy; the landlord's right to distrain was at an end; and the judgment is so concise that it is not possible to say on what ground the case was decided. In *Cook* v. *Cook* (3) it would also appear that there was no demise, and no fixed rent was payable by the tenant.

[Blackburn, J. In Chitty's Statutes it is said that "in order to support the claim against the sheriff, a subsisting tenancy at a rent certain must be proved."]

The only authorities cited for that position are *Riseley* v. *Ryle* (1); *Hodgson* v. *Gascoigne* (2); but there is no direct authority on the point. The object of the statute is to give the landlord a remedy, although the tenant's goods are in the custody of the law, and it is immaterial whether the tenancy is a subsisting tenancy or not, provided the landlord has a right to distrain.

[Blackburn, J. The case states that the plaintiff issued a writ in an action of ejectment on the 26th of March, and judgment was obtained on the 9th of May, and possession delivered on the 22nd of June. The effect of the judgment is the same as that of a judgment under the old procedure: see Common Law Procedure Act,

(1) 10 M. & W. 101. (2) 5 B. & Ald. 88.
(3) Andr. 217.

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1852, s. 207; so that the landlord must be taken to have had possession of the premises on the 26th of March.]

H. Matthews, Q.C. (*J. C. Tindal Atkinson* with him), for the defendant. Sects. 1 and 6 of the statute of Anne are quite distinct sections, passed with different objects. Sect. 1 applies to a case where an execution is levied on the goods of a tenant who continues tenant. The words are: "No goods being on any lands or tenements which are or shall be leased for a term of years shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall pay to the landlord all sums of money as are or shall be due for rent" . . . This section is in its terms confined to subsisting tenancies, and has no application to a tenancy that has determined. There are no words connecting s. 6, still less connecting s. 7, with s. 1. The limit of six months within which a distress is to be made does not apply to a case arising under s. 1. *Hodgson* v. *Gascoigne* (1) appears to be a direct authority for the position laid down in Woodfall on Landlord and Tenant. There Littledale, counsel for the defendant, yielded the point, and it must be assumed that judgment was given on that ground. In *Cook* v. *Cook* (2) the reasons for the judgment are not given, but the facts shew that the tenancy had determined. That there must be a subsisting tenancy in order to support a claim against tne sheriff for not paying a year's rent to the landlord, is laid down in every text-book. In Woodfall on Landlord and Tenant, at p. 444; Coote's Landlord and Tenant, p. 464; Comyn's Landlord and Tenant, p. 396: there certainly is no authority to the contrary.

Griffits was heard in reply.

Cur. adv. vult.

May 1. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.) was delivered by

Blackburn, J. The point which will decide the whole case is, whether or not the plaintiffs have a right to recover against the sheriff for the removal of goods taken under an execution without paying a year's rent to the plaintiffs, the landlords. The facts

(1) 5 B. & Ald. 88. (2) Andr. 217.

are that there was a mortgage to the bank under a deed, which we assume, for the purposes of the case, amounted to a demise at a rent from year to year, so that the relation of landlord and tenant existed between the trustees, the plaintiffs, and the execution debtor, notice to quit was given, and that lease was determined. Subsequently to the determination of the lease, and within six months of it, the sheriff seized on behalf of the execution creditor; and as it was within six months, there would, if the premises were still in possession of the tenant, be a right to distrain given by the statute of 8 Anne, c. 14, ss. 6, 7. I pass by another point, about what the effect of the ejectment would be. What we have now to determine, for the first time, as I believe, is whether the statute of Anne, which by s. 1, before the sheriff removes the goods taken in execution, requires him to pay the landlord's rent, applies to a sheriff who takes goods in execution after the lease has expired, but at a time when the landlord can distrain, because the six months are not out. Now, looking at the words of the statute, it seems clear enough that the sheriff can remove the goods without paying the rent. The first section enacts that no goods or chattels being on lands leased for a term of years, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of such goods, pay to the landlord the rent due, provided it does not amount to more than a year's rent. As the section is worded, there is nothing said about the landlord's right to distrain. Then, by s. 2, it is enacted that the landlord may, within five days, seize goods fraudulently carried away, and sell them as if they had been distrained; and by s. 6 it is enacted that the landlord may, during six months after the lease has been determined, distrain; but there is no enactment that where there is a statutable power of distress there shall be the same obligation on the execution creditor to pay a year's rent as if the term were still existing. Now the question is, whether we are to extend the enactment of s. 1 to those subsequent sections in the same Act by which the powers of distress are extended, or whether it is confined to an existing tenancy. In the text-books, Chitty's Precedents of Pleadings, vol. ii. p. 629, and Chitty's Statutes, vol. ii. p. 1106, tit.

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Landlord and Tenant, it is asserted and put that the obligation is only during an existing tenancy; but they cite a case which, though it supports that proposition, does not decide it. There is, therefore, no decision yet; and we do not think the words of the statute sufficiently wide to justify us in putting a construction upon the statute different from that which has been entertained for 160 years.

Judgment for the defendant.

Attorney for plaintiffs: *Redhead.*
Attorneys for defendant: *Hudson, Matthews, & Co.*

May 2.

THE QUEEN on the Prosecution of THE GUARDIANS OF THE PARISH OF BIRMINGHAM, Respondents; THE GUARDIANS OF THE POOR OF THE WORCESTER UNION, Appellants.

Poor Law—Removal of Pauper—Irremoveability—Break of Residence—9 & 10 Vict. c. 66, s. 1.

The pauper, a journeyman tailor, having resided in the parish of B. for forty-five years, was admitted into the workhouse, and worked there at his trade under the superintendence of the master tailor. R., a tailor, residing in the neighbouring parish of S., being in want of a hand, the master tailor told the pauper that he might go to R.; and if R. and he did not agree, he might come back. The pauper went to R. in the parish of S. and worked for him at 3*s.* a week, with board and lodging, for ten weeks, when R. and the pauper not agreeing, the pauper came back to the workhouse. If they had agreed the pauper might have continued working for R., and R. told the pauper that he might stay as long as he thought proper:—

Held, that the pauper had not become irremoveable from B., as his absence for ten weeks, under the circumstances, was a break of residence.

Upon an appeal to the Borough of Birmingham Quarter Sessions by the Guardians of the Worcester Union against an order dated the 21st of April, 1873, for the removal of Henry Hardman from the parish of Birmingham, in the borough of Birmingham, to the parish of All Saints, Worcester, in the Worcester Union, as the place of his last legal settlement, the recorder confirmed the order, subject to the following case:—

1. The pauper H. Hardman went to live at Birmingham in the year 1827, and continued to reside there and support himself by

working at his trade as a journeyman tailor for upwards of forty-five years from that period down to the 30th of May, 1872. On that day he applied for relief, and was admitted into the Birmingham workhouse, under an order on which was indorsed "irremoveable," and there he remained until the end of the following November, working at his trade, under the direction and superintendence of the master tailor of the workhouse.

2. At the end of November a tailor named Rose, living at West Smethwick, about two miles distant, came to the Birmingham workhouse and saw the master tailor and the pauper in the tailor's shop there, when a conversation took place between them. Rose said he wanted a man to assist him, as he was much pressed with business. He had on several previous similar occasions, through the master tailor, obtained men from the Birmingham workhouse, who had stayed with him till his trade became slack, and then left. He was in the habit of taking a man on at the times only when he was busy.

3. During the conversation at the interview mentioned the master tailor told the pauper that he might go, and if Rose and he did not agree he might come back.

4. The pauper then left the workhouse and went to West Smethwick with Rose and worked for him, receiving the wages of 3*s.* per week and board and lodging in the house of his master. Rose stated in evidence that the pauper worked by the week, that no specific time was ever mentioned as to how long the pauper was to stay, that the pauper left his employment because they could not agree; but if they had agreed, the pauper might still have been working with him, and that he told the pauper that he might stay as long as he thought proper.

5. The pauper stayed with Rose for ten weeks, and then having given him a week's notice, he left and came back to Birmingham and took a lodging at No. 11½, Mill Lane, where he stayed for a week, and then went to the workhouse again.

6. It was contended on behalf of the appellants that the pauper was irremoveable by reason of his forty-five years residence in Birmingham, and that the ten weeks absence at Smethwick did not operate as a break of residence.

7. It was contended on behalf of the respondents that his absence

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constituted a break of residence, and that he was removeable to his place of settlement at Worcester.

8. The recorder was of opinion that the pauper's absence under the circumstances before mentioned operated as a break of residence, and he confirmed the order of removal, with costs.

9. The question for the Court was, whether the absence of the pauper at West Smethwick constituted a break of his residence in Birmingham.

Soden, for the respondents. The question is, whether the pauper's stay of ten weeks at Smethwick operated as a break of residence. That depends upon whether the pauper's absence from Birmingham was temporary or permanent. In *Reg.* v. *Glossop* (1) the pauper went from her mother's house to live out of the parish as a domestic servant on the terms of remaining a month upon trial, and if she remained longer, on the usual terms of a month's warning. At the time she left she intended to return to her mother's house if she received notice to leave within the month. Her mistress gave her notice, and she returned to her mother's house. It was held that her absence for a month was a break of residence. That case is in point, but the present is a stronger case, for in *Reg.* v. *Glossop* (1) the pauper intended to return if she received a notice to leave. In *Reg.* v. *St. Ives* (2), the test is stated to be whether the absence is permanent or is merely a temporary absence. Here the inference to be drawn is that the absence was permanent; the sole reason for the pauper leaving his master was because they could not agree; if they had agreed, the pauper, the case states, "might still have been working with the master, and he told the pauper that he might stay as long as he thought proper." If a person goes out of a parish, and has no intention of returning unless events over which he has no control should occur, such absence would operate as a break of his former residence: *Reg.* v. *Stapleton* (3); *Reg.* v. *Stourbridge*. (4) The case of *Reg.* v. *St. Leonard, Shoreditch* (5), will probably be cited as an authority against the respondents'

(1) Law Rep. 1 Q. B. 227.
(2) Law Rep. 7 Q. B. 467.
(3) 1 E. & B. 766; 22 L. J. (M.C.) 102.
(4) 34 L. J. (M.C.) 179.
(5) Law Rep. 1 Q. B. 21.

contention; but in that case the pauper practically never was out of the parish.

Dugdale, for the appellants. The statute 9 & 10 Vict. c. 66, was passed with the intention of benefiting the pauper, and to relieve poor persons from the extreme hardship of being removed from the neighbourhood in which they had acquired friends to a distant place where, perhaps, they were absolute strangers. The onus of shewing that the status of irremoveability is lost is on the side contesting the irremoveability: *Reg.* v. *Whitby.* (1) If a man goes out of a parish because he has obtained work, and has an intention to return, such absence is not a break of residence. The master tailor told the pauper that he might go with Rose, and if Rose and he did not agree, he might come back. The statement made to him that he might come back was the inducement which operated with the pauper to go to Rose, and he never intended not to return. He went with the intention of working with Rose as long as they could agree, and then to return to the workhouse. The absence is not permanent, but temporary: *Reg.* v. *Tacolnestone* (2); *Reg.* v. *Brighton.* (3) Where the absence is temporary there is no break of residence: *Reg.* v. *Llanelly.* (4)

COCKBURN, C.J. I wish very much we could hold that the pauper was irremoveable, for I think it is a most cruel thing, if not an abuse of the power of the parochial officer, to send a man away who has resided forty-five years in the same place to a place where he has a legal settlement, but not a friend or acquaintance in the world to whom he could turn for a word of comfort. It is a very hard thing, and if I could only find that this man was irremoveable from Birmingham, I should certainly keep him there. It is clear, however, according to the facts of the case, that the man left the workhouse with the tailor, who came there to get a journeyman, with the intention on both sides that as long as they agreed he should remain in the service of the tailor, in the parish of Smethwick, and should not return to Birmingham except upon the speculative possibility of his ceasing to agree

(1) Law Rep. 5 Q. B. 325, 330.
(2) 12 Q. B. 157; 18 L. J. (M.C.) 44.
(3) 4 E. & B. 236; 24 L. J. (M.C.) 41.
(4) 17 Q. B. 40; 20 L. J. (M.C.) 179.

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with his master. If his engagement had not come to an end by reason of the disagreement that sprung up between them he would have continued to remain in the parish of Smethwick, and I cannot say that there was either an actual or constructive residence in Birmingham.

BLACKBURN, J. I also am extremely sorry to be obliged to come to the conclusion that the pauper is not irremoveable. Here, a man, having been resident in Birmingham for forty-five years, came into the workhouse there, and because he, like an honest man, went out of the workhouse to endeavour to get work, and happened to step across the boundary of the parish, he is sent away from the place from which he has not been absent for forty-five years. The cruelty is obvious and the hardship very great.

When the pauper went from Birmingham to Smethwick, as he cannot be resident in two places, the question seems to be, has his bodily departure from Birmingham caused him to cease to reside there, and has he begun a residence in the other parish? There are a great many instances in which a person may be absent from a place, and yet in contemplation of law may reside there. For instance, the case of a judge going on circuit: he still resides at his house, and it would be the same in the case of a barrister who leaves the Temple to go circuit, intending to return to the Temple. Those are temporary absences, but when we come to apply them to the case before us, they are not in point. I cannot come to any other conclusion than that the pauper went to Smethwick to stay so long as he and the tailor agreed. It is not the case of the pauper being hired out by the master of the workhouse, but his leaving the workhouse voluntarily to go to work. He began a residence at Smethwick, which, if continued for a year, would have made him irremoveable from Smethwick. I think he did not, while at Smethwick, continue to reside at Birmingham, and he is, therefore, not irremoveable.

LUSH, J. I share in the regret expressed by my Lord and my Brother Blackburn in having to decide that this man must be removed; but cases of hardship do arise, and will arise, however the Act of Parliament may be framed. There are extreme cases not

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contemplated by the framers of the Act; still, our duty is simply to administer the law, and put a proper construction upon the Act. The Act says the person "shall not be removed from the parish where he shall have resided one year next before." The question is, did the pauper reside in Birmingham one year next before the application for the order of removal. For ten weeks preceding the application he had been living in another parish. Can it be said during that time he did reside, in any proper sense of the term, in the workhouse at Birmingham? I think certainly not, and upon that I cannot entertain a doubt. A person cannot, for the purposes of this Act, reside in two places. Going away for the purpose of getting employment, as the pauper did, without any apparent intention to return (for there is nothing here to lead to that inference), amounts to a break of residence, and the pauper did not, during those ten weeks, reside in the workhouse at Birmingham.

Order of Sessions affirmed.

Attorneys for prosecution: *Prior, Bigg, & Co.*
Attorneys for defendants: *Torr & Co.*

DENNIS *v.* WHETHAM AND ANOTHER.

April 27.

Sheriff—Action for False Return of nulla Bona—No Seizure—Prior Writs fraudulent.

In an action against the sheriff for a false return of nulla bona to plaintiff's writ of fi. fa. for 125*l.*, it appeared that the defendant had not levied at all. There were goods of the execution debtor of the value of 50*l.* upon which he might have levied. There were two writs of fi. fa. against the execution debtor for more than 50*l.* lodged with the sheriff prior to the plaintiff's writ; but these prior writs were proved to be fraudulent as against creditors; the sheriff had, however, no information as to this:—

Held, that the plaintiff was entitled to recover the 50*l.*; that it was the sheriff's duty to have levied, and the plaintiff might then have disputed the validity of the prior writs, and so obtained the proceeds of the levy.

DECLARATION, that plaintiff delivered a writ of fi. fa. to the defendants, the Sheriff of Middlesex, to levy 125*l.* on a judgment against Barlow and Beesley; that there were goods on which

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defendants might have levied, but they neglected to levy, and made a false return of nulla bona.

Pleas: 1. Not guilty; 2. That there were not, after the delivery of the writ, goods of the execution debtors in the defendants' bailiwick whereon the defendants might have levied.

Issue joined.

At the trial before Quain, J., at the sittings in Middlesex during term, it appeared that the plaintiff's writ was lodged at the sheriff's office on the 13th of December, 1873; a warrant was issued the same day, notice being given by the plaintiff's attorney to levy on Beesley's goods only. A writ at the suit of W. G. Beesley and Rebecca Beesley against the debtor Beesley and another, to levy 63*l.*, had been lodged with defendants on the 27th of August, 1873; and another writ on a judgment of W. Arnold against Beesley, to levy 44*l.*, had been lodged on the 30th of September, 1873.

A levy had been made under each of these prior writs, but the goods were claimed in each case under bills of sale, and the levies were therefore abortive. No further levy was made after the plaintiff's writ was lodged; but there were goods of the execution debtor Beesley which might have been seized. Evidence was given that the prior writs were fraudulent as against creditors. As to the first there was no doubt; as to the second the evidence was doubtful.

The jury found that both writs were fraudulent, and that the value of the available goods was 50*l.*; on which findings the learned judge directed a verdict for the plaintiff for 50*l*; with leave to defendants to move to reduce it by the amount of Arnold's writ, if the Court should be of opinion that there was not sufficient evidence of it being fraudulent.

M. Chambers, Q.C. (*Petheram* with him), moved to reduce the damages pursuant to the leave reserved; and also for a new trial on the ground of misdirection in holding the plaintiff entitled to the verdict on the findings of the jury.

On the second point, it must be admitted, since *Imray* v. *Magnay* (1) and *Christopherson* v. *Burton* (2), that the sheriff is

(1) 11 M. & W. 267. (2) 3 Ex. 160; 18 L. J. (Ex.) 60.

liable for a false return of nulla bona, although there are prior writs for more than the amount of available goods, if those writs are fraudulent as regards creditors; but then he must have notice of the fraud, or at least such information as ought to put him on inquiry; in the present case there was no notice and no such information. Moreover, the doctrine of *Imray* v. *Magnay* (1) was doubted in *Bennett* v. *Lawrence* (2), in which case Erle, J., says: "As to the question whether the plaintiff was bound to notice that the prior writ was fraudulent, this case certainly shews that such a doctrine throws great difficulty on the sheriff. He finds a very intricate state of circumstances; he is threatened if he does not pay over the proceeds; he offers to do so on being indemnified; but he is required to go on at his peril, under liability to an action, from which he is relieved only by the accident of having seized goods not belonging to the execution debtor."

He then argued that there was no evidence, or at least not sufficient evidence, of fraud as to the second of the prior writs to justify the verdict.

COCKBURN, C.J. On the larger question our view is against the defendants; and we think that there should be no rule for a new trial. My ground for concurring in this view is, that if the sheriff has various writs of fi. fa. in his hands against the same debtor, he is bound to execute them all, giving priority to each in the order in which they came into his hands; and any one who places one of such writs in the hands of the sheriff is entitled to have it executed, so far as it is possible, in his interest and on his behalf; and the sheriff commits a wrong if, instead of executing, he holds his hand altogether. It is true that the creditor, in order to maintain an action against the sheriff for his breach of duty, must shew damage; but as soon as damage arises the action will lie—in other words, the wrong becomes actionable when combined with damage. Here the plaintiff placed a writ in the hands of the defendants; he was not entitled to priority, if you please, but the sheriff was bound to seize any goods in his bailiwick belonging to the debtor, giving effect to the prior writs; instead of which the defendants do not execute any of the writs at all. The plain-

(1) 11 M. & W. 267. (2) 15 Q. B. 1004, 1012; 20 L. J. (Q.B.) 25.

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tiff says, "If you had executed the writs, I should have been entitled to the proceeds, because the prior writs were fraudulent;" and the sheriff cannot be allowed to say, "The prior writs may have been fraudulent, but I did not know it." He fails in his duty by not executing at all; he is, therefore, in the position of a wrong-doer, and if it be shewn that the prior writs would have been ineffectual by reason of being fraudulent as against creditors, it does not lie in his mouth to say he did not know it: he has prejudiced the position of the execution creditor by not levying on goods which he might have taken in execution. There will, therefore, be no rule, except on the question as to the second of the prior writs being fraudulent.

BLACKBURN, J. I am of the same opinion. Where more writs than one are placed in the hands of the sheriff, the second creditor's right is subject to the right of the creditor whose writ was lodged first. When there are any goods of the debtor, the sheriff should levy under all the writs, and when he has seized, should apply them to the prior writ; and if he has seized, and the proceeds are not sufficient to satisfy more than the first writ, he may return nulla bona to the second writ, and the return would be good, and sustained by the facts. But if the sheriff does not seize at all, and he returns nulla bona to the second writ, he does not make a true return; for he has not seized, and there were goods liable to satisfy the execution. He has therefore made a false return; but no action can be maintained against him without proof of damage to the execution creditor; and if the sheriff can shew that if he had seized the goods the proceeds would have been applicable to the prior writs, he shews that the plaintiff is not damnified. But in the present case, if the sheriff had seized, and had returned or informed the plaintiff that he had seized, and was going to apply the proceeds to the prior writs, the plaintiff, the third execution creditor, would have given notice to the sheriff not to pay over the proceeds; and in some way, if not by interpleader, by rule or otherwise, the sheriff would have had a right to say, "Let Dennis fight it out with Arnold and the other creditors," and then, if Arnold's and the others' writs turned out fraudulent, Dennis, the plaintiff, would have got the money. But the sheriff did not seize at all,

so that the plaintiff has lost all opportunity of getting the proceeds; and, as I understand, the argument was, that the sheriff had not notice that the prior writs were fraudulent, and the plaintiff is not now entitled to shew that they were fraudulent. But the liability of the sheriff does not depend on notice, but on whether the prior writs were fraudulent, and therefore the plaintiff is entitled to keep his verdict, for the whole, or part only, if the second of the prior writs was not shewn to be fraudulent.

ARCHIBALD, J. I am of the same opinion. The effect of conceding the position put forward by the defendants' counsel would be to enable the sheriff to postpone indefinitely the right of execution creditors when there are more writs than one in his hands at once. Primâ facie, where there are goods of the debtor on which to levy, the sheriff is bound to seize at once. If it is shewn that rent is due exceeding the value of the goods, the sheriff is excused from levying at all, and may return nulla bona; and where the levy has been made, and in the result the expenses absorb all the proceeds, in that case also the sheriff might justify a return of nulla bona. So, if he levy under prior writs, and these writs absorb all the proceeds, he may return nulla bona to the subsequent writs. But here the sheriff made no levy at all; and if he had levied it may be that the natural or inevitable consequence would have been that the plaintiff would have been able to have avoided the prior writs by shewing them to have been fraudulent, and the plaintiff would have got the 50*l.*, the value of the goods which might have been seized. The rule must, therefore, be refused for a new trial, and granted only to reduce the damages.

Rule accordingly.

Attorney for defendants: *W. Maynard.*

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April 29.

THE QUEEN *v.* THOMAS CASTRO, otherwise ARTHUR ORTON, otherwise SIR ROGER CHARLES DOUGHTY TICHBORNE, Baronet.

Certiorari removing Indictment for Perjury from Central Criminal Court—Specification of County in which Offence shall be tried and Jury summoned—9 & 10 Vict. c. 24, s. 3—Trial at Bar—Appointment of Days in Term and Vacation for Trial—Adjournment of Trial at Bar—Sentence on Conviction passed out of Term—11 Geo. 4 & 1 Wm. 4, c. 70, s. 7—Perjury on Oath taken in Chancery before Commissioner—16 & 17 Vict. c. 78—Sentence of Penal Servitude—2 Geo. 2, c. 25—Sittings at Nisi Prius at Westminster, where to be holden—18 Eliz. c. 12—33 Vict. c. 6, s. 7.

By 9 & 10 Vict. c. 24, s. 3, every writ of certiorari for removing an indictment from the Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction.

An indictment was found by the grand jury in the Central Criminal Court for perjury committed within the jurisdiction of the Central Criminal Court. The perjuries assigned in one count were in respect of an oath taken before a commissioner in Chancery, in the city of London; and in the other count, in respect of an oath taken in the Court of Common Pleas, in Middlesex. The indictment was removed by certiorari into the Court of Queen's Bench, and Middlesex was specified as the county in which the indictment should be tried, and the jury were taken from that county:—

Held, that the Court of Queen's Bench had a discretion to name in the certiorari the county or jurisdiction in which the trial was to take place, and that by the jurors summoned from that jurisdiction the same issues could be tried that would have been tried in the Central Criminal Court had the indictment not been removed.

By 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7, if a trial at bar shall be directed by any of the Superior Courts, it shall be competent for the judges of such Courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed and taken to be a part of the preceding term.

A trial at bar having been ordered, in an indictment for perjury, the Court of Queen's Bench, in Hilary Term, appointed for the trial the 23rd of April, 1873, and every day up to and inclusive of the 1st day of November, 1873, and further ordered that, in case the trial should not terminate on or before the 1st day of November, 1873, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the Court should then direct. The Court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat. The Court afterwards, in Michaelmas Term, 1873, made a second order, appointing every day in Michaelmas Term, 1873, and every day up to Michaelmas Term, 1874, for the trial. On the 28th of February, 1874, a day in vacation after

Hilary Term, the defendant was found guilty, and the Court immediately passed sentence on him :—

Held, that the Court had, under the above enactment, power to appoint such days as they should think fit for the trial, and that it was not necessary that this power should be exercised once for all, or that it should be limited to the appointment of days in the vacation next succeeding the term in which the order was made.

Held, also, that, as an incident to the trial at bar the Court had power to adjourn from time to time.

Held, also, that a sentence, passed out of term, but on one of the days which, by virtue of the above enactment, are, "for the purposes of the trial, to be taken as part of the preceding term," was good, passing sentence being part of the trial.

The opinion of the judges in *O'Connell* v. *The Queen* (11 Cl. & F. at p. 250), dissented from on this point.

The 2 Geo. 2, c. 25, s. 2, imposes the sentence of transportation (now altered to penal servitude) on persons convicted of perjury according to the laws then in being. The defendant was convicted of perjury on an indictment, one count of which averred that the oath was taken in the Court of Chancery before a commissioner authorized to take an oath by 16 & 17 Vict. c. 78; he was sentenced to penal servitude upon that count :—

Held, that the offence of perjury consists in taking a false oath in a judicial proceeding, and whether the oath is taken in a judicial proceeding before a Court at common law, or acting under a statute, it is equally an oath taken in a judicial proceeding, and punishable by penal servitude.

Under 33 Vict. c. 6, s. 5, sittings at nisi prius for Middlesex may be held at the Sessions House, Westminster, instead of in Westminster Hall.

INDICTMENT for perjury. The first count contained assignments of perjury committed upon the trial of an action of ejectment, *Tichborne* v. *Lushington and Others*, at Westminster, in the county of Middlesex, before Bovill, C.J., in the Court of Common Pleas. The second count contained assignments of perjury contained in an affidavit sworn before a commissioner duly appointed to administer oaths in Chancery in the city of London.

The indictment was removed by certiorari into the Court of Queen's Bench, and, on the motion of the Attorney General, a trial at bar was ordered. The trial, which took place before Cockburn, C.J., Mellor and Lush, JJ., began on the 23rd of April, 1873, and terminated on the 28th of February, 1874, when the defendant was found guilty and sentenced to seven years' penal servitude on each count of the indictment.

April 18. *Kenealy, Q.C.* (*M'Mahon* and *Cooper Wyld* with him), moved for a rule nisi for a new trial, or to arrest the judgment, or

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for a venire de novo, on the following grounds: first, that the trial of the action of ejectment, at which the oath was administered, and which was alleged to be perjury as mentioned in the first count, was held before Bovill, C.J., not in Westminster Hall, but at the Sessions House, in Westminster, and that the Chief Justice, sitting at the Sessions House at Westminster, had no power to administer an oath; and although the sitting at the Sessions House was adjourned by the consent of the defendant, yet that consent did not give jurisdiction. He referred to 18 Eliz. c. 12; Vin. Abr., tit. "Trial," (S a. 2), *Vansittart* v. *Taylor* (1); *Lawrence* v. *Wilcock.* (2)

Secondly, that the perjuries assigned in the second count were in respect of an oath taken before a commissioner in Chancery, in the City of London, and that the offence, having been committed in the city of London, could not be tried by a jury summoned from the county of Middlesex. He referred to 4 & 5 Wm. c. 36, ss. 2, 4; *Reg* v. *Mitchell.* (3)

Thirdly, that under 9 Geo. 4 & 1 Wm. 4, c. 70, s. 7, the Court in banco can only make one appointment for one term and the succeeding vacation for a trial at bar, and that the Court sitting at the trial at bar had no power to adjourn the trial from the 31st of October to the 17th of November.

Fourthly, that the sentence, having been passed on the defendant out of term, was a nullity: *O'Connell* v. *The Queen.* (4)

Fifthly, that the offence for which the defendant had been convicted on the second count was not perjury for which a sentence of penal servitude could be imposed: 16 & 17 Vict. c. 78; 2 Geo. 2, c. 25, s. 2.

The facts of the case sufficiently appear from the judgment.

Cur. adv. vult.

April 29. The judgment of the Court (Cockburn, C.J., Blackburn, Lush, and Quain, JJ.) was delivered by

BLACKBURN, J. In this case an indictment was found by the

(1) 4 E. & B. 910; 24 L. J. (Q.B.) 198.

(2) 11 A. & E. 941.

(3) 2 Q. B. 636.

(4) 11 Cl. & F., per Tindal C.J., at p. 250, and per Lord Lyndhurst, C., at p. 325.

grand jury in the Central Criminal Court for perjury committed within the jurisdiction of the Central Criminal Court. It was removed into this court by a writ of certiorari, which, as required by statute 9 & 10 Vict. c. 24, s. 3, specified Middlesex as the county in which it should be tried. On the application of the Attorney General it was ordered that the trial should be at bar. This Court, in Hilary Term, under statute 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7, appointed for the trial the 23rd of April, 1873 (being a day in Easter Term), and every day up to and inclusive of the 1st day of November, 1873, being the day before the first day of Michaelmas Term, and further ordered that in case the trial should not terminate on or before the 1st day of November, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the Court should then direct. The jury was taken from the county of Middlesex, and the trial at bar commenced. The Court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat; and in particular, there was an adjournment from the 31st day of October, 1873, to the 17th day of November, 1873, which was a day in Michaelmas Term. To this last adjournment the defendant's counsel objected, and the Court adjourned without any consent.

The trial having been protracted, this Court, in Michaelmas Term, 1873, made a second order, appointing every day in Michaelmas Term, 1873, and every day up to Michaelmas Term, 1874, for the trial. The trial proceeded, and on the 28th day of February, 1874—a day in the vacation before this term—the defendant was found guilty, and the Court then passed sentence on him of penal servitude on each count. Within the first four days of this term, the counsel for the defendant moved for a rule nisi for a new trial, or to arrest the judgment, or for a venire de novo, on grounds which will be presently noticed, most of the objections having been taken and disposed of during the trial at bar.

It must not be supposed that by entertaining the motion for a new trial we express any opinion as to the competency of the Court to re-hear and reconsider points of law already decided by the same Court when sitting at bar. It will be time to decide this

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point when it becomes necessary to do so, but we are desirous of guarding ourselves against any inference in favour of such a proposition from the fact of our having heard the application.

We are all of opinion that no ground whatever has been shewn for doubting that the proceedings from first to last have been perfectly regular, that the verdict was properly obtained, and is quite satisfactory, and that the sentence was properly passed by the Court, sitting in banc, on a day which, by 7 Geo. 4 & 1 Wm. 4, c. 70, s. 7, was for the purposes of this trial at bar to be taken to be part of the preceding term, viz., Hilary Term, 1874. We pronounced at once our reasons for saying that there was no colour for the motion for a new trial on the ground that the verdict was unsatisfactory on account of the way in which it was obtained. On the other grounds of motion we postponed giving our reasons, not from any doubt entertained by any member of the Court, but because this being in some respects a new case, we were desirous of expressing our reasons precisely, so as to be an assistance to our successors, if a similar case should occur again.

We now proceed to deal with the different objections made as they arose in order of date, without regard to the order in which the counsel brought them forward. The indictment, as already stated, was originally preferred in the Central Criminal Court, a new court, created by statute 4 & 5 Wm. 4, c. 36, with a jurisdiction including the city of London, the county of Middlesex, and parts of the counties of Essex, Kent, and Surrey. The grand jury in that court had jurisdiction to find a bill for offences committed within any part of this jurisdiction, and trials in the Central Criminal Court are, by the 4th section, to be by jurors "taken wholly from the said city or the said counties, or taken indiscriminately from the said city and the said counties." The certiorari is not taken away, and therefore an indictment found in the Central Criminal Court may be removed into the Court of Queen's Bench, and may be there tried; but the original Act does not contain any express provision as to the manner in which the jury are to be summoned in the Queen's Bench. As the issue to be tried is, whether the offence charged by the indictment was committed within the jurisdiction of the Central Criminal Court, it may, on the trial of any indictment, appear that the

offence was committed in any one of the five counties out of which that district is formed, and it did in fact appear on the trial of the case now before us that the perjuries assigned in one count were in respect of an oath taken in Chancery within the city of London, and that the perjuries assigned in the other count were in respect of an oath taken in the Court of Common Pleas in Middlesex. On this it was contended that the venire summoning a jury from Middlesex was originally wrong, or, at least, that when it appeared that one of the offences charged took place in London, the Court should have ruled that the Middlesex jurors could not try that offence. But the legislature have, by a subsequent enactment, foreseen and provided for this difficulty. Statute 9 & 10 Vict. c. 24, s. 3, is as follows:—"And whereas doubts have been raised as to the proper place of trial where indictments have been removed by writ of certiorari from the Central Criminal Court into the Court of Queen's Bench, be it enacted that every writ of certiorari for removing an indictment from the said Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction." We cannot doubt that the true construction of the statute is that the Court of Queen's Bench shall have discretion to name in the certiorari the county or jurisdiction in which the trial is to take place, and that by the jurors summoned from that jurisdiction the same issues shall be tried that would have been tried in the Central Criminal Court had the indictment not been removed. These objections, therefore, fail.

The next objection relates to the order of the Court made in the Hilary Term, 1873, directing that a number of days should be appointed for the trial, extending beyond the then next term, and the long period then appointed having proved too short, a second order was made in Michaelmas Term, 1873, appointing further days. It was contended that a trial at bar, if it could be protracted beyond the first vacation after it began, was necessarily to fail. It is a sufficient answer to cite the words of the statute 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7:—"If a trial at bar shall be directed by any of the said Courts, it shall be competent for the judges of such

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courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed and taken to be a part of the preceding term." It is impossible to use words more clearly declaring that the Court should have the most absolute discretion to appoint such days as they should think fit for the trial; and there is nothing either in the object of the enactment or the language used to require either that this power should be exercised once for all, or that it should be limited to the appointment of days in the vacation next succeeding the term in which the order was made.

It was then contended that the adjournment of the Court vitiated the whole proceedings. It is scarcely possible to suppose that this objection was seriously made. The Court was sitting on a day which, for the purpose of the trial, was to be taken as part of the then preceding term. It is incident to a trial that the Court may, for sufficient reason, adjourn it, and there is nothing whatever, either in the words of the enactment or the object of the legislature, to take away this power from the Queen's Bench sitting on a trial at bar in what is by legislative enactment to be taken as part of the term.

Two objections were then made arising on the evidence at the trial. It appeared that the trial at nisi prius, before the Chief Justice of the Common Pleas, was in fact holden in the Sessions House at Westminster, and not in any sense of the words "within Westminster Hall." It was argued that the sittings of the Court of Common Pleas at nisi prius in Middlesex were held only under the authority of 18 Eliz. c. 12, which authorizes sittings within "the said hall called Westminster Hall, in Westminster." And therefore it was said that a witness on a trial at nisi prius, held, as this in fact was held, near to but not in Westminster Hall, could not be there guilty of perjury. We should be most reluctant to give any countenance to the notion that on a trial before one of the judges of the superior courts, who has general jurisdiction over the subject, a witness might commit perjury with impunity on account of any defect or irregularity in the proceedings, especially when, as in this case, the irregularity, if it were one, was waived by the parties, who, though they cannot by consent give jurisdiction, can waive an irregularity. But it is quite

unnecessary to consider that, for by the statute 33 Vict. c. 6, s. 5, "any number of judges may at one and the same time hold a sitting or sittings at nisi prius either in London or Westminster, as may be deemed expedient by the Court." The rooms in which the ordinary sittings of the superior courts at nisi prius are held in Middlesex are limited in number, and when more judges sit at nisi prius than usual, some must sit elsewhere. It was for that reason that the ejectment was tried in the Sessions House in Westminster, and we think it quite clear that the statute 33 Vict. c. 6, made such a course quite regular. We by no means say that the law previously was that the sittings at nisi prius were to be holden only in the usual courts, which if they are "within the hall called Westminster Hall" are only so constructively; but only that, if it was so, it is so no longer.

A further objection was made that the oath on which the perjuries in one count were assigned was taken in the Court of Chancery, before a commissioner authorized to take the oath by 16 & 17 Vict. c. 78. It was said that the sentence of penal servitude on this count could not be justified, because the oath was taken in a manner not authorized by the law at the time 2 Geo. 2, c. 25, which imposed the sentence of transportation (now penal servitude) on perjury, was passed. This is quite unfounded. The offence of perjury consists in taking a false oath in a judicial proceeding, and whether the oath is taken in a judicial proceeding before a court at common law, or acting under an earlier or later statute, it is equally an oath taken in a judicial proceeding, and equally perjury, and equally punishable by penal servitude.

One more objection was taken. The sentence in the present case was passed by this Court when the verdict was delivered, not in term, but on one of those days which, by virtue of the statute 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7, already cited, are, "for the purposes of the trial, to be deemed and taken as part of the preceding term." (1) It was argued that the Court could do nothing during those days but take the verdict, and that consequently sentence could not be then passed, but must of necessity be delayed till the next or some ensuing term. If this were so, it

(1) Ante, p. 355.

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would follow that we should treat the sentence actually passed as a nullity, and, on the application of the prosecution, grant a rule to bring up the defendant during term, and then pass the sentence that appeared to the Court as then constituted to be the proper one. Great inconvenience would arise from pursuing this course, and no benefit to any one is likely to result; but still, if such was the course prescribed by the law, we must follow it, however troublesome and useless it might be. We are, however, clearly and undoubtingly of opinion that it was competent for the Court to pronounce sentence at the time. As on this point an authority was cited, it is necessary to examine the question fully, as we dissent from that authority. All courts of oyer and terminer sit for the trial of the causes brought before them. If the issue raised during the trial of one of these causes be on matter of fact, it is to be tried by the jury, under the supervision of the Court. If it is matter of law, it is to be tried by the judges; if matter of record, by the record itself: see Terms de la Ley, "Trial." The question what the sentence in a criminal cause should be is a question of mixed law and judicial discretion, to be guided by the facts proved on the taking of the verdict, and therefore is to be determined by the judges, and so it is properly and technically included in the word "trial." The trial by the Court of the cause before it includes all those, and the word "trial" is not confined to taking the verdict. The superior courts sat at common law only during term time and at Westminster. When an issue of fact arose which required to be tried by the verdict of a jury, process issued to bring up the jurors from the proper venue to Westminster, and the verdict was found there under the superintendence of the Court sitting during term, and if for any sufficient reason the whole trial was not completed during the term in which it began, the cause was adjourned, and the trial completed at a future sitting or sittings of the Court, which were necessarily holden in term time. As early as the Statute of Westminster the Second, 13 Ed. 1, A.D. 1285, a remedy was provided for part of the inconvenience, expense, and delay arising from this state of the law. By that statute power was given to the courts at Westminster to award a writ of nisi prius commanding the sheriff to bring the jury to Westminster in the next term, "unless the justices of assize should first come to his county." And in case

such a writ was awarded, the justices of assize were to take the inquisition, and return the same to the court at Westminster, where judgment should be given. In practice it became a matter of course to award a writ of nisi prius in every case, unless either the Crown was a party concerned, and refused its assent, or the Court in its discretion thought fit to direct that the trial should be at bar on account of the importance of the case. In either case the trial proceeded in the court in term time at Westminster, as at common law. It was not usual to issue a commission of assize in Middlesex, and consequently, in causes in which the venue was in Middlesex, all trials remained as at common law till a much later period, when, by various statutes which it is unnecessary to cite, the Chief Justices and Chief Baron were directed to hold sittings at nisi prius in London and at Westminster, and the award of nisi prius in town causes is, therefore, "unless first the Chief Justice come," &c. In all respects material to the question before us the law and practice is the same in town and in country causes. The direction of the Court would more properly have been called a direction that there should be no award of nisi prius than a direction that the trial should take place at bar; but the latter phrase has been in use so long that it would be pedantry to try to alter it now. Substantially the law remained the same down to the passing of the statute 11 Geo. 4 & 1 Wm. 4. Two inconveniences were found to result in practice, which the statute was designed to remedy. The first was that in the comparatively rare cases in which there was a trial at bar, it must necessarily be in term time, to the great delay of all the ordinary business of the court, and if the trial was not completed within the term in which it began, it must of necessity be adjourned till the next term, and then completed. The other inconvenience was that when there was a criminal trial in the Queen's Bench, and there was an award of nisi prius, the authority of the judge on circuit or Chief Justice at nisi prius being, not to try the cause, but simply to take the inquisition, sentence was of necessity postponed till the next term. Whenever that sentence was discretionary, the Court in banco was very much guided by the report of the judge who presided when the criminal was found guilty, but it was necessary to bring that report before the Court, and there was much delay and expense

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occasioned both to the prosecution and to the defendant. Both these inconveniencies were, amongst others, remedied by the Act for the more effectual administration of justice in England and Wales, 11 Geo. 4 & 1 Wm. 4, c. 70. By the 9th section it was provided that judgment might be pronounced by the judge at the sittings or assizes, subject to a power in the Court of King's Bench, within the first six days of the next ensuing term, to grant a rule to amend the judgment. In *The King* v. *Lloyd* (1) a motion was refused for such a rule. The judgment of Parke, J., very clearly indicates what the mischief was which it was meant to remedy—"To ground a motion of this kind the party ought to point out some essential defects in the sentence, otherwise we should lose, and not gain, by the enactment of the late statute; for after sentence had been passed at the assizes we should still be called upon in a number of cases to hear the report of the trial, affidavits, and speeches of counsel, in this court, as the practice was before the Act." It is obvious that those who framed the Act could not wish to introduce for the first time, in a trial at bar, a necessity to postpone sentence till next term, producing an inconvenience similar to that which was by the same statute taken away in the case of trials at nisi prius. Still it is possible that, from want of skill, they might use words which would compel us to say that such was the enactment; and if they had enacted that the days appointed, if in the vacation, should, "for the purposes of taking the verdict, and those only," be deemed to be a part of the preceding term, we should have had great difficulty in avoiding that conclusion. The objection taken is grounded on the assumption that the word "trial" in this Act is to be construed as meaning "taking the verdict." But in construing all writings it is a general rule that we are to understand the words used in their technical sense, if they have acquired one, or if not, in their ordinary sense, unless there be something to shew that they are used in some secondary sense; and in *Heydon's Case* (2) Lord Coke says it was resolved, "that, for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: 1. What was the common law before the making of the Act;

(1) 4 B. & Ad. 135.

(2) 3 Rep. 7 *b*.

2. What was the mischief and defect for which the common law did not provide; 3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and 4. The true reason of the remedy; and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy." We cannot doubt that the defect which the legislature intended to amend was that trials in the superior courts could not be holden except in term time, which was inconvenient when the verdict had to be taken before the Court, and the remedy was that, when a trial at bar was directed in any cause, the Court might appoint days for the trial, which, if in vacation, should, for the purposes of the trial of that particular cause, be deemed to be in term, and on which the Court might therefore dispose of that cause just as they might at common law have done had those days been days in term time. To substitute for the word "trial" the words "taking of the verdict," or any similar words, or to construe the word "trial" as limited to the taking of the verdict, would be an alteration and straining of the words of the legislature for the purpose of defeating their obvious intention. We have no doubt that we cannot do so, and we should not have thought it necessary to render our reasons so much at length were it not for the expressions used by Tindal, C.J., in the opinion delivered by him in the case of *O'Connell* v. *The Queen* (1), which certainly are an authority to the contrary. It is to be remembered how that opinion came to be delivered. The Court of Queen's Bench in Ireland had, under the Irish Act (which is identical in its terms with the English Act), appointed days in the vacation after Hilary Term for the trial of that cause. On one of those days the jury delivered in a long special finding on the issues, and on this finding many troublesome questions arose. Had the verdict been delivered on a day which actually as well as constructively fell in Hilary Term, the Court of Queen's Bench might, and on such findings probably would, have postponed sentence till those points were argued, and for that purpose adjourned the cause till the next term; nor can any reasonable doubt be entertained that in point of fact the Court of Queen's Bench in Ireland did, on receiving these findings, declare that they would do so: for on the

(1) 11 Cl. & F. at p. 250.

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first day of the next term—Easter Term—the parties did appear; motions were made on their behalf in arrest of judgment and otherwise, and after long arguments sentence was pronounced in Trinity Term. But when the record was made up and returned in obedience to the writ of error, all that appeared on the record was that these special findings were taken on the 12th of February, being one of the days which, by virtue of the statute, were, for the purposes of the trial, to be deemed part of Hilary Term; and that on the 15th of April, being the first day of the ensuing Easter Term, the parties appeared; and that having done so, and taken various steps in the cause it was continued into Trinity Term, in which the sentence was passed. The counsel for the defendants assigned thirty-three grounds of error, some of which were very serious, and on one of which the judgment was reversed. But many were frivolous, and amongst those was the twentieth objection—"that there was not any proper continuance from the time when the verdict was given to the following term, when judgment was pronounced." The House of Lords had to determine for the first time whether this objection was good, and whatever might have been the judgment if there had been a long series of precedents determining that the absence of a formal entry was fatal, it is obvious that there could be but one decision when it was a case of the first impression. The House thought fit to ask the judges, amongst other questions, whether this was a good ground for reversing the judgment. The unanimous answer of the judges, delivered by Tindal, C.J., was that it was not, and the judgment of the House was that it was not. But in delivering the reasons for that answer of the judges, Tindal, C.J., does, undoubtedly, state, as the ground of his opinion, that the day appointed was a day in term for the purpose of the trial, which no one doubts; but he assumes that the trial means in this statute the taking of the verdict, and nothing more. (1) He gives no reasons for this assumption; it had not been argued at the bar of the House, and it evidently was not much considered. If this was part of the ratio decidendi of the Lords in that case, we should be obliged to submit to it; but the opinions of the judges rendered to the House are but advice to assist the House, as was strongly shewn in that very case,

(1) 11 Cl. & F. at p. 250.

where the Lords, by a majority of one, gave judgment contrary to the opinions of a great majority of the judges. But though not binding on us, the opinion of such an eminent lawyer as Tindal, C.J., is to be treated with great respect, and the more so as all the other judges subscribed to his opinion, giving this as a reason. We should not, therefore, presume to dissent from that opinion if it were not that we find this point was not argued, and the opinion seems to have been hastily adopted without considering the reasons, which we think would have brought those learned persons to an opposite opinion, and which certainly lead us, without any doubt, to hold that the sentence was in this case properly pronounced.

These are all the objections that were made, and we think that none of them are tenable.

Rule refused.

Attorney for defendant: *C. Harcourt.*

REDGRAVE, APPELLANT; LEE AND OTHERS, RESPONDENTS.

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Factory Act, 1867 (30 & 31 *Vict. c.* 103), *s.* 3, *subs.* 7—"*Factory*"—*Process carried on in open Air—Manufacture of Cement.*

Premises, consisting of ten acres, in which the manufacture of cement from chalk and mud is carried on chiefly in the open air, and in which 200 people are employed in grinding and washing in mills, but in which there is no great building in which men and women are employed under cover, are not a "factory" within 30 & 31 Vict. c. 103, s. 3, subs. 7.

Kent v. *Astley* (Law Rep. 5 Q. B. 19) followed.

CASE stated by justices of Kent under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, sub-inspector of factories, against the respondents, under s. 28 of 7 & 8 Vict. c. 15, charging that they, on and at, &c., being the occupiers of a certain factory within the true intent and meaning of the Factory Acts, did unlawfully fail to hang up in the entrance of the factory a notice of the names and addresses of the inspector and sub-inspector of the district in which the factory is situate, and other particulars required to be inserted in the said notice.

At the hearing the appellant relied on s. 3, subs. 7, of 30 & 31 Vict. c. 103, which enacts that, "for the purposes of this Act the word factory" shall mean "any premises, whether adjoining or

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separate, in the same occupation, situate in the same city, town, parish, or place, and constituting one trade establishment in, on, or within the precincts, of which fifty or more persons are employed in any manufacturing process;" and by the same section, "manufacturing process" shall mean "any manual labour exercised by way of trade, or for the purposes of gain, in or incidental to the making an article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article."

The appellant called as a witness William Rayner, who said:

I am general foreman and timekeeper in the employ of Messrs. Lee & Son (the respondents). The premises are in the occupation of the respondents. Cement is manufactured on those premises, and lime also is burnt there. I know what cement is made of. Chalk is used in its preparation. Lime is not used in it. Mud is also used. The first process which chalk is subjected to in making cement is placing it into a washmill with mud. The chalk is first dug from a pit. After the chalk and mud leave the washmill it passes through pipes to a force pump, it is then forced through the pump into the backs, and there it deposits itself; it is then wheeled from the backs to the flues, and there dries, then passes from thence to the kilns; it is then burnt, then drawn from the kilns, then crushed, then ground between stones, then passed into a shed, and it then becomes cement ready for the market and is put into casks and sacks. There are over 200 people employed on the premises; these include pitmen, carters, lime burners, cement manufacturers, barge loaders, engine fitters, blacksmiths, wheelwrights, sawyers, engine drivers, kiln fitters, coalheavers, barge builders, fluemen, men employed at the wash mills, spoutmen, millers, crushermen, kiln drawers, tippers. I recollect the inspector paying a visit to the premises on the 10th of June instant; there was then no notice on any part of the premises containing the names of the inspector and sub-inspector of factories of the district. I have never seen such a notice upon the premises.

On cross-examination the witness said:

The premises are very extensive. The chalk pit extends over three acres, and is a mile away from the works. There is a railroad from the pits down to the works; it is about a mile long. The other works occupy about ten acres. There is no great building where men and women are employed under cover. The mills are separate and detached, but stand upon the ten acres. There is a hole on the top of them, and on each side there is an open cowl over each of them. There are temporary covers over the mills in some places to protect the machinery. There are no boys working at the mills. I know Philip Peters; he does not work in any covered building. His duty is to tally the chalk into the washmill, and while doing so he stands in the open air; that is his only duty; he is under the age of sixteen years, and he is the only boy under that age employed on the works. The river is on one side of the works, and the works are all open to the country on all other sides. There is no entrance-gate which is

used. There is an ordinary five-barred gate from the turnpike road which is opened for cattle to go in. There is no entrance-gate or place where a notice could be affixed without being exposed to the wind, rain, or weather.

On re-examination the witness said:

It is the habit of the men to come on to the premises just where they can; there is an entrance to drive a horse and trap through near the fitter's shop; that is the entrance by which strangers would enter the premises; there is an entrance at the end of the backs. This brings the men into any part of the works. The men come on the premises across a field, and through the entrance behind the pens. The men get over the fence, and get into the works where they can. A notice could be put up where the entrance is for a horse and trap, but it must be placed outside. There is a boy who works in the engine fitting shop; his name is George Strong, he runs of errands and attends to the men, moves things about from one place to another for the use of the men. I know a boy of the name of Eyles. I do not know whether either of those boys are under the age of eighteen years. Most of the work is carried on under a felt cover open all round; there is no division between the cement works, the lime works, the carpenters' shop, and the fitting works; only the walls to support the buildings and gear. There is nothing to prevent anyone getting into the works in certain places where there are no fences. The railway runs at the top of the works; but there is a field between the works and the railway. That field is not part of the premises where manufacturing process goes on, the field is the boundary of those premises.

It was contended on the part of the respondents, that the premises were not a "factory" within the meaning of the Factory Acts; that the manufactory carried on is not one of those mentioned in s. 3 of 30 & 31 Vict. c. 103, or of a similar nature; that those Acts apply only to closed buildings; that there is no separate building in which fifty persons are employed; that 30 & 31 Vict. c. 15, s. 3, subs. 7, does not apply to cement works like those in question, and that the principle involved in the case of *Kent* v. *Astley* (1) was precisely the same as in the present case; that the several sheds could not be considered as being joined together for the purpose of bringing them within the provisions of the Factory Acts; that only one boy is employed on the premises under the age of sixteen years, and he is employed out of doors in the open air as a tally boy, to see what chalk and mud is put into certain wash mills.

The justices, being of opinion that the evidence did not bring the case within the operation of 30 & 31 Vict. c. 103, s. 3, subs. 7, dismissed the information.

(1) Law Rep. 5 Q. B. 19.

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The question of law for the Court was, whether the cement works and premises are within the operation of the Factory Acts.

C. Bowen, for the appellant, contended that the case was to be distinguished from *Kent* v. *Astley* (1), and referred to the Factory Act, 1871 (34 & 35 Vict. c. 104), s. 5.

Manisty, Q.C. (with him *Lee*), for the respondents, was not called upon.

COCKBURN, C.J. I am of opinion that this case is governed by the decision in *Kent* v. *Astley*. (1) No doubt it is very difficult to draw the line; but the definition of "factory" and of "manufacturing process," does seem to imply something more than a process which is carried on to all intents and purposes in the open air. If buildings predominated this might be a factory; but the whole may be said to be carried on in the open air. By the late Act, brickfields have been to a certainextent, brought under the operation of the Factory Acts; but the legislature have not thought proper to go further, and extend the general definition of factory.

BLACKBURN, J. I am of the same opinion. In *Kent* v. *Astley* (1) all the Court were agreed that the operation of the Act of 1867 was confined to trades carried on in buildings; and that is fully justified by the definition of "factory" and "manufacturing process." [The learned judge read the definitions.] If it appeared in the present case that in the ten acres, though they were uninclosed, so many as fifty persons were employed under cover, so as to form one trade establishment, the justices should have found the fact. But here they have found the contrary, and, as I understand the evidence, they were quite right in the conclusion they came to. The legislature had the subject before them in 1871, and they might then have amended the former Acts, if the decision of this Court in *Kent* v. *Astley* (1) did not carry out what they had intended should be the law.

Judgment for the respondents.

Attorney for appellant: *Solicitor to the Treasury.*

Attorneys for respondents: *Sandys & Trevenen, for Hayward, Rochester.*

(1) Law Rep. 5 Q. B. 19.

WALSH *v.* WALLEY AND ANOTHER. 1874

Master and Servant—Contract of Hiring—Notice to leave—Forfeiture of Wages due. May 1.

Plaintiff was a weaver employed by defendants as a weekly servant, his wages being regulated by the number of pieces which he wove and delivered to his masters. The wages of the defendants' workmen were ascertained and fixed at noon on Thursday in each week, but were not paid till the next Saturday. By rules embodied in the contract of hiring, the workmen were required to give, before leaving, fourteen days notice at the time of booking up on Thursday. "Persons leaving without notice will forfeit all wages due."

On a Thursday, the sum earned by the plaintiff in the preceding week, was ascertained and fixed at 15*s*. He commenced another week on the afternoon of the same day and worked during the morning of Friday, and earned 7*s*. He left during the forenoon of Friday without having given any notice:—

Held, that the plaintiff forfeited, by leaving before the Saturday, the wages due on the Thursday, but not payable till the Saturday, as well as the wages earned between noon of Thursday and Friday morning.

CASE, on appeal from the County Court of Lancashire, holden at Blackburn.

Action to recover 22*s*. for wages alleged to be owing by the defendants to the plaintiff.

The following facts were admitted: The plaintiff was a weaver, in the employ of the defendants, who are cotton manufacturers, at Blackburn. He was a weekly servant, and his wages were regulated by the number of pieces which from time to time he wove and delivered to his masters. The practice at the defendants' mill was, that the wages earned by the workmen at the mill were ascertained and fixed at noon on Thursday in each week; but the wages so ascertained and fixed were not paid to the workmen entitled thereto until the succeeding Saturday.

The workmen worked under certain rules, which were embodied in the contract of hiring between the masters and workmen. The rules are as follows:—"All persons in our employ are required to give fourteen days notice before leaving, such notice to be given at the time of booking up. Fourteen days notice will be given previous to discharging any person, except for spoiling or neglecting work, in which case they will be discharged forthwith. Persons leaving without notice will forfeit all wages due, and their return to work may be refused."

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The term "booking up," in the above rules, is understood by the parties to mean the Thursday in each week.

The principal part of the wages sued for, namely, 15*s.*, was earned by the plaintiff in the week of his service which ended at noon on Thursday, the 25th April, 1872; and such sum was ascertained and fixed at that time. The plaintiff commenced another week of his service on the afternoon of that day; he worked during that afternoon and also during the morning of Friday, the 26th of April, and he earned during that time, 7*s.*, the residue of the 22*s.* sued for. He left the service on the forenoon of Friday, without having given any notice of his intention to leave.

His reason for so leaving, was an intended alteration in the weaving shed in which the plaintiff worked; but, for the purposes of this appeal only, it was admitted that the plaintiff left the service without any reasonable or justifiable cause.

The plaintiff applied for payment of his full wages, namely, 22*s.*, on Saturday the 27th of April; but his application was refused altogether on the ground that his wages had been forfeited.

At the hearing, the same ground of defence to the action was taken. It was held by the judge, that, as the plaintiff had left the service after the commencement of the week beginning at noon on Thursday, the 25th of April, without proper notice of his intention to leave, the wages earned during that week were forfeited, and could not be recovered; but that the wages earned in the previous week, and which were ascertained and fixed on Thursday, the 25th of April, were vested in the plaintiff, and were not divested or forfeited, either by the general law or by the special agreement contained in the rules, by the plaintiff leaving the service without notice in a subsequent week of his service. And a verdict for the 15*s.* was given accordingly.

The question for the opinion of the Court was, whether the wages earned by the plaintiff in the week ending at noon on Thursday, the 25th of April, were forfeited by the plaintiff having left the service on Friday, the 26th of April, 1872, without having given notice of his intention to leave.

If the Court was of opinion that such wages were so forfeited, the verdict was to be set aside and judgment for the defendants to be entered.

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R. G. Williams, Q.C., for the defendants. The only wages "due" when the plaintiff left without notice, were the 15s. fixed on the Thursday, but not payable till the Saturday The wages earned during the current week were forfeited by the general law; and by the special terms of the contract embodied in it in the form of rules, the wages due, but not payable, were forfeited. It is clear that the postponement of the payment was intended, together with the forfeiture clause, to give as much protection as possible to the masters. On any other construction, the words would be nugatory. [He referred to *Button* v. *Thompson*. (1)]

J. Edwards, for the plaintiff. The rule as to forfeiture was intended to prevent a break in the service between the booking-up days. The wages were not weekly, but by the piece.

[LUSH, J. The postponement of the payment for two days after the wages are ascertained, seems to be on purpose to secure some motive in the servant for giving proper notice. On any other construction, if he left directly after the booking-up, without notice, he would forfeit nothing.]

COCKBURN, C.J. The only reasonable construction of these rules is that contended for on the part of the defendants; otherwise a man could, as soon as the wages were fixed, at once leave on the Thursday without notice, and yet incur no forfeiture. The rules were clearly intended to protect the masters against this contingency. It has been argued that the clause of forfeiture was intended to prevent workmen leaving in the middle of the week; the answer to that argument is, that the wages of the current week would have been forfeited by the general law. The rules must have been framed with a view to protect the masters against the possibility of the men working up to Thursday, and then leaving without any notice.

BLACKBURN, J. I am of the same opinion. This is the case of a weekly hiring, the wages to be regulated and paid in each week according to the amount of work done; and the wages to be paid in each week are to be fixed and ascertained on the Thursday, but not to be paid till the Saturday. Then all wages "due" are to be forfeited if the workman leaves without notice. Here, the plaintiff

(1) Law Rep. 4 C. P. 330.

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left without notice, and the only wages "due" were those fixed on the Thursday, and he has therefore forfeited them by the express terms of the contract. I give no opinion as to what would have been the consequence if the masters had not paid the wages on the Saturday and the plaintiff had left on the Monday without notice.

LUSH, J. I am of the same opinion. It is clear the rules were framed with the intention that any workman who leaves without notice shall forfeit something at whatever part of the week he leaves. That can only be carried out by his forfeiting all the wages that have not been paid when he leaves.

Judgment for the defendants.

Attorneys for both parties: *Doyle & Edwards.*

May 4.

FLETCHER *v.* BAKER.

Trial in County Court—Notice of Demand of Jury—Three clear Days before the "Day of Hearing"—9 & 10 Vict. c. 95, ss. 70, 71—County Court Rules 104, 105.

By 9 & 10 Vict. c. 95, ss. 70, 71, and County Court Rule 104, notice of demand of a jury must be made and five shillings paid to the registrar of the court three clear days before the day originally fixed for the hearing; and if a notice has not been given in due time, and the hearing be adjourned to a subsequent day, the party cannot demand a jury as of right; but it is in the judge's discretion, under rule 105, whether he will allow a jury to be summoned.

THIS cause was sent by judge's order, under 19 & 20 Vict. c. 108, s. 26, to be tried in a county court; and the 18th of February was the day appointed for the hearing, notice of which was sent to both parties. The plaintiff's claim exceeded 5*l.*, and the defendant sent a notice of demand for a jury, under 9 & 10 Vict. c. 95, s. 70, which was posted on the 14th, but did not reach the registrar till the morning of Monday, the 16th of February; and the notice was not accompanied by the fee of 5*s.*, as required by 9 & 10 Vict. c. 95, ss. 70 and 71, and County Court Rule 104. (1) The

(1) 9 & 10 Vict. c. 95, s. 70. "In all actions where the amount claimed shall exceed five pounds it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action; and in all actions where the amount claimed shall not exceed five pounds, it shall be lawful for the judge,

defendant was informed of the informalities by the registrar on the 16th, and he then made a fresh demand in writing for a jury, and paid the 5*s*. On the 18th no jury was summoned, but the cause, on account of the non-attendance of the defendant's counsel, was adjourned by consent, on the defendant paying the costs of the day, to the 19th of March. On that day no jury was summoned, and the judge (after protest by the defendant, that he was entitled to a jury by virtue of his notice given on the 16th of February) tried the case without a jury and gave a verdict for the plaintiff.

The defendant then obtained a rule for a new trial, on the ground that he was entitled to have the cause tried by a jury.

Francis shewed cause. It is a condition precedent to the right of either party to have a jury under 9 & 10 Vict. c. 95, ss. 70 and 71, and county court rule 104, that the notice should be given and the fee of 5*s*. paid three clear days before the "day of hearing;" this must mean the day originally fixed for hearing, and the mere accident of the case being adjourned for some cause or other cannot entitle the party to a jury as of right. The defendant,

in his discretion, on the application of either of the parties, to order that such action be tried by a jury; and in every case such jury shall be summoned according to the provisions hereinafter contained: provided always that the party requiring a jury to be summoned shall give to the clerk [registrar] of the court, or leave at his office, such notice thereof as shall be directed by the rules made for regulating the practice of the court as hereinafter provided; and the said clerk shall cause notice of such demand of a jury, made either by the plaintiff or defendant, to be communicated to the other party to the said action, either by post, or by causing the same to be delivered at his usual place of abode or business; but it shall not be necessary for either party to prove on the trial that such notice was communicated to the other party by the clerk."

Sect. 71. "Every party requiring any jury to be summoned shall, at the time of giving the said notice, and before he shall be entitled to have such jury summoned, pay to the clerk of the court the sum of five shillings for payment of the jury, and such sum shall be considered as costs in the cause, unless otherwise ordered by the judge."

County Court (Common Law) Rules:—

"104. Notice of demand of a jury shall be made in writing to the registrar of the court three clear days before the day of hearing, and the summonses to the intended jurors shall be delivered to the bailiff forthwith."

"105. Where notice of a demand of a jury has not been given in due time, or if, at the hearing, both parties desire to try by a jury, the judge may, on such terms as he shall think fit, adjourn the case in order that the necessary steps for such trial may be taken, and the trial shall take place accordingly."

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when the case was adjourned on the 18th of February, should have obtained the judge's leave to have a jury under rule 105, or he should have made it a condition of his consenting to an adjournment that the case should be tried by a jury.

W. A. Lewis, in support of the rule. The defendant was entitled to have the case tried by a jury. This he was entitled to of right, as the cause of action was for more than 5*l.*, provided he gave the notice and paid the fee in due time. The "day of hearing" means the day on which the cause is heard, and if the hearing is adjourned for more than three days, so that there is time to give a notice, it is immaterial that the notice was not given in time for the day originally fixed for the hearing. The defendant was therefore entitled to have a jury, and the adjournment having been consented to by the parties, it was not within the discretion of the judge, under rule 105, to refuse the jury. Sect. 70 gives either party an absolute right to a jury when the cause of action is above 5*l.*, the necessity of the notice and payment of the fee is simply for the purpose of allowing time for summoning and providing payment of the jury.

COCKBURN, C.J. I am of opinion that the rule must be discharged. I cannot help thinking that, upon the proper construction of rule 104, the "day of hearing," means the day appointed for the hearing, and not the day of actual hearing, which may depend on a variety of circumstances, such as the amount of business to be got through. Then rule 105 would not have been framed as it is unless it had been intended, in the absence of agreement of the parties to try by a jury, that it should be in the discretion of the judge to allow a jury when the party has not put himself in a position to demand it as of right. On the whole, therefore, I am of opinion that the notice to entitle either party to a jury must have been given and the fee paid three clear days before the day originally fixed for the hearing: and if by any accident the cause is adjourned, the judge may, in his discretion, permit or refuse the trial by a jury. In the present case he was not asked for permission on the adjournment, and the adjournment was not for the purpose of summoning a jury, and he afterwards refused to allow a jury to be summoned. The rule must therefore be discharged.

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BLACKBURN, J. I am of the same opinion. By ss. 70 and 71 of 9 & 10 Vict. c. 95, the giving of such notice to the registrar of the Court as the rules direct is made a condition precedent to the right of either party to have a jury summoned. This is a preliminary to the trial, and must take place before the hearing. Sect. 71 adds the additional requirement that the party demanding a jury shall at the time of giving the notice, and before he shall be entitled to have a jury summoned, pay to the registrar 5*s.* for payment to the jury. Then rule 104 says the notice shall be given in writing three clear days before "the day of hearing," and when this has not been done, rule 105 gives a discretion to the judge to adjourn for the purpose of summoning a jury. In the present case, the first notice was not given three clear days before the day fixed for hearing, or at all events, was not accompanied by the 5*s.*, and therefore the notice came to nothing. A second notice was given on the 16th of February, accompanied by the fee, but this was not three clear days before the 18th of February, the day of hearing. On that day the adjournment took place to the 18th of March, but this was not for the purpose of summoning a jury. And on the case coming on for hearing the judge denied the right of the defendant to have a jury, and tried the case without one. The question is, was the defendant entitled to a jury, or was the judge right in refusing to allow a jury to be summoned? On the whole, I think the best construction of the sections and rules in question is, that in order to entitle himself of right to a jury, the party must give a notice accompanied with the fee three clear days before the day appointed for the hearing, and where no such notice has been given and the case is tried by adjournment on a day subsequent to the day on which it was originally appointed to be heard, it is in the judge's discretion whether he will or will not allow it to be tried by a jury. The rule must therefore be discharged.

QUAIN and ARCHIBALD. JJ., concurred.

Rule discharged.

Attorneys for plaintiff: *Monkton, Long, & Co.*
Attorneys for defendant: *Lewis, Munns, & Longden.*

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BLADES AND ANOTHER *v.* LAWRENCE.

Judge's Order, with Signature impressed by Stamp—County Court—City of London Court—Rule substituted for Mandamus—19 & 20 Vict. c. 108, s. 43—30 & 31 Vict. c. 142, ss. 34, 35.

When an order purporting to be made by a judge at Chambers, and bearing the signature of the judge impressed by a stamp, in the usual way, transferring a cause from the superior court to the county court, is served on the judge of the county court, he is bound to obey the order, and he cannot inquire into the circumstances under which it was made.

By the operation of ss. 34 and 35 of 30 & 31 Vict. c. 142, the City of London court is made a county court for all purposes, and all the county court Acts apply to it; and consequently, the proper mode of proceeding against the judge of the London court is by rule under 19 & 20 Vict. c. 108, s. 43; and the proviso in s. 35, reserving all rights and privileges of the judge, has no application to the case.

RULE obtained by the plaintiff under 19 & 20 Vict. c. 108, s. 43, calling upon the judge of the City of London court to shew cause why he should not hear and determine this cause, and why the judge should not pay the costs of this application.

It appeared from the affidavits that the cause had been transferred to the London court by judge's order, at the instance of the defendant, under s. 7 of 30 & 31 Vict. c. 142.

On the case coming on in the London court, the judge, according to his usual practice, desired to see the judge's order, and it bearing only the stamped signature of the judge, he inquired into the circumstances under which the order was made, and it appeared that the summons had been heard by consent before one of the masters, who made the order, which was then drawn up by the judge's clerk, and the signature of the judge was also impressed by the clerk. Upon these facts the judge of the London court refused to hear the cause and ordered the entry to be struck out. The judge stated that it had been his practice for some time to satisfy himself that the order when not actually signed by, is in fact the order of, a judge, inasmuch as the cause being by such order transferred altogether to the City of London court, it may become the judge's duty to direct further proceedings therein, and it may be to order the committal to prison of one or other of the parties in the action, or of a witness called and examined therein. In the present case, the order having been made by a master, the

judge considered it was made without jurisdiction, as the master had no authority to make the order, as the power of the master to transact business of the courts at Chambers only extended to business done at Chambers at the time of the passing of 30 & 31 Vict. c. 68.

Sir J. B. Karslake, Q.C., shewed cause. He conceded that the master had jurisdiction to make the order under 30 & 31 Vict. c. 68, s. 1, although the statute giving the power to a judge (30 & 31 Vict. c. 142, s. 7) was passed afterwards, as the Court of Exchequer have just decided that the master has the power. (1) But he contended that the judge of the City court was justified in inquiring whether the order was really made by the judge, inasmuch as if the order were made without jurisdiction, the judge of the City court might be liable to an action. He also contended that the proceeding by rule was erroneous, and that the proper proceeding was still by mandamus, as by the proviso in s. 35 of 30 & 31 Vict. c. 142; all the powers, rights, and privileges of the judge of the City court were preserved to him.

W. A. Lewis, in support of the rule, was directed by the Court to confine his argument to the last point, as to the mode of proceeding. By s. 43 of 19 & 20 Vict. c. 108, the proceeding by mandamus is abolished and that by rule substituted in the case of a county court judge. By s. 4 of 28 & 29 Vict. c. 99, the City of London court is put in the position of a London county court. By s. 21 of 28 & 29 Vict. c. 99, 9 & 10 Vict. c. 95, and all Acts amending the same (of which 19 & 20 Vict. c. 108 is one), are to be taken as one with 28 & 29 Vict. c. 99, and again in 30 & 31 Vict. c. 142, s. 34, all the County Court Acts are to be read as one with this Act, and then s. 35 says that "county court" in this Act and all future Acts relating to county courts, shall include the City of London court; and the proviso reserving all rights only applies to peculiar matters, and cannot have any reference to general procedure.

COCKBURN, C.J. I am of opinion that this rule must be made absolute. I entertain no doubt that the master who made the order for transferring this cause to the county court had full

(1) See *Walsh* v. *Smith*, Ex. Apr. 27, Weekly Notes, May 9, 1874.

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jurisdiction to make that order; and if he had signed it himself, instead of getting the signature of the judge stamped upon it, the order would, in my opinion, have been perfectly good. Consequently, if the judge of the London court had had any jurisdiction to inquire into the validity of the order, bearing as it did the stamped signature of a judge of one of the superior courts, he ought to have been satisfied on finding that the order had been made by one of the masters of one of the superior courts. But I am of opinion that it was not competent to the judge of the London court to enter into any such inquiry. There was an order of the superior court, affirming on the face of it that it emanated from the superior court, and was made by the authority of the court or judge. The only course, therefore, for the judge of the London court was to obey the order. Had there been on the facts any question; if, for instance, it had appeared that the judge's clerk had affixed the signature without any authority whatever, the judge of the London court might have applied to the superior court to set the order aside: but it clearly was not competent to the judge, on his own motion, to determine the validity or invalidity of the order bearing the proper authentication on its face; his only course was either to obey it or to get it set aside by application to the superior court.

The other question is open to more difficulty, whether the proceeding by rule was the right course against this particular judge, or whether it ought to have been by mandamus. On consideration, I am of opinion that the course adopted was right, and that the contention of the judge, that he could only be proceeded against by mandamus, is not correct. Under s. 7 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), power is given to any of the superior courts, under certain circumstances, to send a case commenced in the superior court for trial to the county court in which the action might have been commenced; and by s. 35, "county court" is to include the City of London court. And the question is, whether s. 43 of 19 & 20 Vict. c. 108, which enacts that the proceedings against a judge of a county court shall be by rule instead of mandamus, applies to the judge of the London court; I think it does. The intention of the legislature was to place the City of London court to all intents and purposes on the same footing as the county courts, and I should have thought this, even

if s. 34 of the Act of 1867 did not apply. That section, however, enacts that this Act and the several Acts in sched. D shall be construed together as one Act; and in sched. D is 19 & 20 Vict. c. 108. The only remaining question is, whether the proviso in s. 35 of the Act of 1867, that nothing in this Act, or in any of the Acts in sched. D, shall take away, lessen, or diminish any of the powers, rights, or privileges of the judge of the London court, prevents the operation of s. 43 of 19 & 20 Vict. c. 108. I do not think it was at all intended that the proviso in s. 35 should have this effect. It preserves to the judge and the common council their various rights; but I cannot help thinking that in giving power to the superior courts to send down cases in certain circumstances to the county court, the legislature meant to assimilate the London court to the county courts, and also to substitute the convenient and speedy mode of proceeding by rule instead of mandamus in the case of the judge of the London court as well as in the case of the judges of the county courts.

BLACKBURN, J. I am of the same opinion on the first point. By s. 7 of the Act of 1867, a cause may be removed from any of the superior courts, by order of a judge of the Court, to any county court in which it might have commenced, and by s. 35 county court includes the London court. In the present case such an order was made, and was received by the judge of the London court. That order was not a forgery, but had been issued in the ordinary way, and, according to the practice long established at Judge's Chambers, by the clerk of the judge, having on it the signature of the judge, stamped by the clerk. Had it been a forgery the judge's course might have been to apply to the court to set it aside. But the judge had made a rule of practice for himself, and if, as he says, the judicial mind has not been exercised in making the order, to treat the order as a nullity. It is clear that the order ought to have been obeyed, and that the judge has been guilty of a great contempt in treating an order of the judge of this court as a nullity. Then comes the question as to what is the proper remedy. At common law the remedy against an officer for not performing a duty which he is bound to perform is by mandamus; but by 19 & 20 Vict. c. 108, s. 43, the proceeding

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by mandamus in the case of the judge or any officer of a county court is abolished, and a proceeding by rule simply substituted; and if the London court is within that enactment, the mandamus is taken away and the present rule is right; if it is not within the enactment, then the mandamus would still lie; we are, therefore, bound to say whether the course of legislation has been such as to make the provisions of s. 43 of 19 & 20 Vict. c. 108, apply to the judge of the London court. I have had, and still have considerable doubt. I do not think for a moment that the proviso in s. 35 of the Act of 1867, saving all rights and privileges of the judge of the London court, would have the effect of preserving what can hardly be called a right or privilege of being proceeded against by mandamus, if preceding legislation had taken away the proceeding by mandamus in his case. But I hardly think, myself, that the previous legislation has done this, though I have little doubt it was intended. However, my opinion is of little consequence, as the majority of the Court are the other way, and I do not intend to go through the different sections of the Acts to justify my opinion. The substance of the matter is that the judge has been contumaciously wrong; and, in my opinion, the rule should be made absolute against him with costs.

QUAIN, J. I am of the same opinion. The first point appears to me to be perfectly plain. The order was issued according to the ordinary every day's practice; it was a genuine order, the summons being first heard by the master, and the judge's signature stamped by the clerk. If the signature had been put per incuriam, or had been a forgery, that would have been a different matter. The judge of the London court has attempted, mero motu, to go behind the order, to ascertain whether there has been the exercise of the judicial mind in making the order. It is clear that he had no such power. The only other question is, whether the remedy is by rule under s. 43 of 19 & 20 Vict. c. 108, instead of by mandamus. The object of that section was to substitute a speedy and inexpensive remedy instead of a tedious and expensive one; and s. 42 contains a similar provision as to prohibition. The only question is, does s. 43 apply to the London court. I think it does. The object of the Act of 1867, by s. 35, was to bring that court into the category of county courts for all

general purposes, leaving only to the judge of the London court all his peculiar rights and privileges as such judge, and the corporation all their rights. Sect. 34 of the Act of 1867 expressly enacts that that Act and all the Acts enumerated in sch. D, shall be construed as one Act. That makes the 19 & 20 Vict. c. 108, part of the Act of 1867, and reading them together, s. 43 will apply to the judge of the London court, which by s. 35 of the later Act is to be included in the term county court; and the proviso of s. 35, which talks of powers, rights, and privileges, cannot be construed to prevent the operation of s. 43; for the remedy against a judge by the writ of mandamus cannot be said to be a power, right, or privilege. In thus holding, I think we carry out the whole scope of the legislation as to county courts, and are following the very terms of the last Act.

ARCHIBALD, J. I entirely concur in all that has been said as to the disobedience by the judge of the London court of the order made at Chambers. The order was authenticated in the usual way; and I cannot admit that he had any right to inquire into the circumstances under which it was made; could he be allowed to do so it would be an example of most pernicious consequences; for it would be equally open to any one else to do the same. The judge was entirely and inexcusably in the wrong, and I think, therefore, the rule ought to be made absolute with costs. As to the second point, I agree with what has been said by my Lord and my Brother Quain, I think there is sufficient to explain the proviso in s. 35 with reference to the salary, right to fees and compensation, which are to be left intact; but with these exceptions the object was to put the London court and the judge on precisely the same footing as the county courts. Sect. 35 says county court shall include the City of London court, and s. 34 says the present Act shall be read as one with the other Acts, among which is 19 & 20 Vict. c. 108; this incorporates the whole of the provisions, including s. 43, substituting the proceeding by rule for mandamus. Convenience tends entirely that way; and I think we carry out the intention by so holding, because after 19 & 20 Vict. c. 108 has been incorporated with the Act of 1867 by s. 34, and read as one Act, s. 35 says "county court"

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when used in this Act shall include the London city court; it therefore includes the use of the word in 19 & 20 Vict. c. 108, as well.

COCKBURN, C.J. The judge's conduct has been so perverse as to amount almost to contumacy; the rule will therefore be absolute with costs.

Rule absolute.

Attorneys for plaintiffs: *Lewis, Munns, & Longden.*
Attorneys for defendant: *Torr & Co.*

April 25.

PITTS, APPELLANT; MILLAR, RESPONDENT.

Cruelty to Animals—12 & 13 *Vict.* c. 92, *s.* 3—*Baiting Animals*—*Rabbits.*

A match took place between the owners of two dogs as to which could kill the greatest number of rabbits by running after them. The match took place in a field containing an area of three acres, walled in so that the rabbits could not escape:—

Held, that this was not baiting animals within the meaning of 12 & 13 Vict. c. 92, s. 3.

CASE stated by justices for the borough of Dewsbury, in the West Riding of the county of York, under 20 & 21 Vict. c. 43.

The appellant was charged on an information that he did unlawfully use a certain place, to wit, a field, for the purpose of baiting a certain animal, to wit, a rabbit, and did then and there bait such rabbit, contrary to 12 & 13 Vict. c. 92, s. 3. (1)

(1) 12 & 13 Vict. c. 92, s. 3. "Every person who shall keep, or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid: Provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence."

At the hearing the following facts were proved:—

On Saturday afternoon, the 12th of July, the respondent and two police sergeants went to a field at West Town, in Dewsbury, occupied by one Solomon Eastwood, and known as the Borough Park Grounds. A person was at the entrance of the grounds receiving money for admission. The grounds consist of a field containing an area of 3*a*. 3*r*. 15*p*., which is walled and paled round so that an animal such as a rabbit cannot escape therefrom. There were 400 to 500 men in the grounds, and a match took place for 25*l*. a side between two dogs as to which could take the greatest number of rabbits by running after them; the witness saw the appellant and other persons taking part; a person had two dogs in a slip, and the appellant and another man had each hold of one of the dogs' tails; a man took a live rabbit and shook it in front of the two dogs, and then took a rabbit and let it loose about sixty yards in front of the dogs, which were then slipped, and ran and killed the rabbit. This was done to about twenty rabbits, and the dog which killed the greater number of rabbits was the winner of the 25*l*.

It was contended on behalf of the appellant, that this was not such a baiting of an animal as came within the section of the Act of Parliament, and that a person who set a greyhound at a hare in a coursing match, or who put on the hounds in a fox covert, might just as well be charged with baiting the hare or fox.

The justices considered that those cases differed from the present, as the hare or fox might escape, but that in this case a rabbit could not possibly get away from the dogs, and that this was such a case of baiting an animal as s. 3 intended to meet; and they convicted the appellant.

The question for the opinion of the Court was, whether the above facts constituted an offence within 12 & 13 Vict. c. 92.

Sir J. B. Karslake, Q.C. (*Forbes* with him), for the appellant. There are two questions: first, whether the field is "a place kept or used for the purpose of baiting" rabbits; and, secondly, whether hunting rabbits with dogs in the manner stated in the case is "baiting." With regard to the first point, this was not a place kept, that is, regularly kept, for the purpose of baiting

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animals. There appears to be only one user of this field, and there is no evidence that it was a place generally kept and used for the purpose of baiting animals: *Clarke* v. *Hague* (1); *Morley* v. *Greenhalgh* (2); *Coyne* v. *Brady*. (3)

[COCKBURN, C.J. If from a sudden and accidental circumstance a place was used once for the purpose of a bull-bait it might perhaps be said not to be within the section; but if a publican who has a yard gives notice that a bull will be baited in the yard, though the place is not always appropriated to that purpose, would it not be a place used for baiting a bull?]

It might be so were it not for the decisions.

[QUAIN, J. The point was not made before the justices; we must assume it to be a place within the enactment.]

As to the second point, clearly the facts do not amount to baiting. In the first place, a rabbit is not an animal that can be baited—bulls, badgers, and rats being animals that by nature can defend themselves, can be baited; but in this case the object was to kill as many rabbits as speedily as possible, and to test the skill and fleetness of two dogs. The enactment does not apply to killing animals by chasing.

The respondent did not appear.

COCKBURN, C.J. I am clearly of opinion that the pursuit of rabbits by dogs is not baiting animals. That term is usually applied when an animal is tied to a stake or confined so that it cannot escape.

QUAIN, J. The facts stated do not amount to baiting, but to hunting rabbits. I find that in Johnson's Dictionary the word "bait" is said to mean "to attack with violence," or "to harass by the help of others; as we bait a boar with mastiffs, but a bull with bull-dogs." This conviction cannot be sustained.

Judgment for the appellant.

Attorneys for appellant: *Blakeley & Beswick, for Ibberson, Dewsbury.*

(1) 2 E. & E. 281; 29 L. J. (M.C.) 105.

(2) 3 B. & S. 374; 32 L. J. (M.C.) 93.

(3) 12 Ir. C. L. 577.

THE QUEEN *v.* THE GUARDIANS OF STEPNEY UNION.

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April 29.

Criminal Lunatic—Prisoner acquitted of Felony on ground of Insanity, Maintenance—Order of Justices adjudging Settlement—9 Geo. 4, c. 40, s. 54—3 & 4 Vict. c. 54, s. 7—Overseers, "Debt, Claim, or Demand from," to be paid during current Half-year—22 & 23 Vict. c. 49, s. 1—Effect of Repeal of Statute which has been amended by a subsequent Statute before Repeal.

By the joint effect of 9 Geo. 4, c. 40, s. 54, and 3 & 4 Vict. c. 54, s. 7, power still remains, notwithstanding the total repeal of 9 Geo. 4, c. 40, by 8 & 9 Vict. c. 126, s. 1, in two justices to inquire into and adjudge the settlement of a person detained in custody during pleasure who has been acquitted of felony on the ground of insanity, and to order the overseers or guardians of the parish of settlement to pay such weekly sum for his maintenance as the justices shall from time to time direct.

Such order is binding on the guardians when served upon them, although not accompanied by grounds of chargeability and particulars of settlement.

Each weekly sum ordered by the justices to be paid is a "debt, claim, or demand" due from the guardians within 22 & 23 Vict. c. 49, s. 1, and must be paid, or proceedings commenced to enforce the payment, within the time limited by that section, or the recovery will be barred.

MANDAMUS, dated the 15th of December, 1871, to the guardians of the Stepney Union, reciting that on the 24th of November, 1869, Adelaide Freedman was indicted for murder at the Central Criminal Court, and was found by the jury to be insane, and she was ordered to be confined during Her Majesty's pleasure, that two justices of the city of London, on the 21st of December, 1869, adjudged her place of settlement to be in the parish of St. Paul, Shadwell, in the Stepney Union, and ordered the guardians to pay to the superintendent of the Broadmoor Criminal Lunatic Asylum, as soon as she should be removed to the asylum from Newgate, 14*s.* a week during her confinement in the asylum; that A. Freedman was removed to the asylum on the 7th January, 1870, under an order of the secretary of state, dated the 30th of December, 1869, where she is still confined as a lunatic; that although the order of justices was served on the guardians, they had not paid any of the said weekly sums; and that there is now due 44*l.* 18*s.* in respect of them; and commanding the defendants to pay to the superintendent of the asylum the said sum.

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Return by the defendants:—

1. That A. Freedman was not found insane as alleged.

2. That the said justices had no power or jurisdiction to make the supposed order, and the said order is therefore wholly null and without effect.

3. That before the order was made the guardians received no summons or notice to attend before the justices, and they did not appear upon the inquiry.

4. That the order of justices is in the words following:—

To the guardians of the poor of the Stepney Union, in the county of Middlesex, in which the parish of St. Paul, Shadwell, is comprised, and to the overseers of the poor of the said parish, and to each of them. London to wit. Whereas, one Adelaide Freedman was on the 22nd day of November, in the year of our Lord 1869, at the general session of oyer and terminer of our Lady the Queen, held for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the city of London, indicted for murder, and at the same session of oyer and terminer held as aforesaid on the 24th day of the said month of November, the said Adelaide Freedman was found to be insane by a jury lawfully empanelled, whereupon the Court ordered the said Adelaide Freedman to be confined during Her Majesty's pleasure. Now we, Samuel Wilson, Esq., and Sir William Anderson Rose, Knight, being two of Her Majesty's justices of the peace in and for the said city of London and the liberties thereof, in which the said Adelaide Freedman was so tried and found insane as aforesaid (no one of Her Majesty's principal secretaries of state having otherwise directed) having now received evidence on oath touching the said several premises, do adjudge the same to be true, and we, the said Samuel Wilson, Esq., and Sir William Anderson Rose, Knight, such justices as aforesaid of in and for the said city of London and the liberties thereof, do now inquire into and ascertain, by the best evidence and information which can be obtained under the circumstances of the personal legal disability of the said Adelaide Freedman, into the place of the last legal settlement, and the pecuniary circumstances of the said Adelaide Freedman, and it now appearing to us, the said justices, that the said Adelaide Freedman is not possessed of sufficient property which can be applied to her maintenance, and having now received evidence on oath touching the place of the last legal settlement of the said Adelaide Freedman, do by this our order, under our hands and seals adjudge that the said Adelaide Freedman is lawfully settled in the parish of St. Paul, Shadwell, in the county of Middlesex, and whereas the said Adelaide Freedman is now confined in Her Majesty's gaol of Newgate, and whereas upon the making of this order a warrant will be issued by one of Her Majesty's principal secretaries of state for the removal of the said Adelaide Freedman from the said gaol of Newgate to the Criminal Lunatic Asylum at Broadmoor, in the county of Berks; now we do hereby order you, the guardians of the poor of the Stepney Union, in which the said parish of St. Paul, Shadwell, is comprised, from and immediately after the removal of the said Adelaide Freedman from the said gaol of Newgate to the Broadmoor Criminal Lunatic Asylum aforesaid, to pay on behalf of the said parish to the superintendent for the time being of the said

criminal lunatic asylum weekly and every week the sum of fourteen shillings, the same having been proved before us to be a reasonable charge in that behalf, for the maintenance of the said Adelaide Freedman in the said lunatic asylum during her confinement therein under and by virtue of the warrant so to be issued by one of Her Majesty's principal secretaries of state as aforesaid, or until it shall be otherwise ordered according to law. Dated 1st December, 1869, signed, &c.

That the order is illegal and bad on the face of it for not shewing that A. Freedman was at the time of the making of the order kept in custody within the jurisdiction of the justices; and for not shewing that it was made upon an information or complaint; and for not shewing that the guardians had any summons or notice to attend the inquiry.

5. That the order was not duly served upon the guardians as alleged.

6. That the order has never been served upon the guardians by the delivery of a copy accompanied by a statement in writing setting forth the grounds of the order, including the particulars of the settlement, and in consequence the guardians have been unable to appeal to quarter sessions.

7. That as to 25*l.* 4*s.*, part of the 44*l.* 18*s.*, it consists of thirty-six sums of 14*s.* each, from the 14th of January, 1870, to the 23rd of September, 1870, and the same were debts, claims, or demands, and the total sum of 25*l.* 4*s.* was a debt, claim, or demand lawfully incurred by and becoming due from the guardians after the passing of 22 & 23 Vict. c. 49, and were incurred and became due before the 29th of September, 1870; that the half-year's accounts for the Stepney Union ought to have been and were closed according to the order of the Poor Law Board up to the 25th of March, 1870, the 29th of September, 1870, and the 25th of March, 1871, respectively; and that no proceedings were taken for the recovery of the said 25*l.* 4*s.*, or any part of it, within the half-year ending on the 29th of September, 1870, or within three months after the expiration of such half-year.

8. That for the reasons aforesaid the defendants ought not and cannot pay to the superintendent of the asylum the sum of 44*l.* 18*s.*, for the maintenance of A. Freedman.

The prosecutor pleaded, inter alia,

2. To paragraph 1 of the return, that the order of justices is in

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the words and figures set forth in paragraph 4 of the return, and is in full force and validity.

5. To paragraph 5, that the order was duly served on defendants as alleged in the writ.

6. To paragraph 6, that the order was duly served upon defendants according to the statutes in such case made and provided.

The prosecutor also demurred to paragraphs 1, 2, 3, 4, 6, 7.

The defendants replied, inter alia,

To 5th plea, on equitable grounds, that after the order had been made, and after A. Freedman had been removed to and admitted into the said asylum, to wit, on or about the 14th of January, 1870, a copy of the order, but not accompanied by a statement in writing setting forth the grounds of such order, including the particulars of the settlement relied upon in support thereof, was served on the defendants, that the defendants intending to appeal against the order, duly entered their appeal against the same for hearing at the general quarter sessions for the city of London, that the appeal duly came on to be heard at the quarter sessions on the 9th of April, 1870, in which appeal the defendants were the appellants and Edward James Read, the clerk of the peace for the city of London, was the nominal respondent on behalf of the plaintiff [sic, quære prosecutor], that both parties duly appeared by counsel, that the respondent objected to the jurisdiction of the Court to proceed in the hearing of the appeal on the ground that the order had not then been duly served on the defendants by reason that the same had not been accompanied by a statement in writing setting forth the grounds of order including the particulars of the settlement relied upon in support thereof, and that until such statement had been served there was no grievance to the defendants against which they could appeal and as to which the Court were empowered to give relief; and the defendants by their counsel admitted that no such statement had been served, and thereupon the Court refused to hear the appeal, and the counsel for the respondent said that the order should be duly served on the defendants; and that although by the order the moneys therein mentioned are ordered to be paid weekly, yet from the 9th of April, 1870, to the 31st of March, 1871, no application

for payment was made to the defendants; and the defendants, believing and relying by reason of the premises that before the plaintiff would attempt to enforce the order he would cause the same to be duly served, accompanied by such statement in writing as aforesaid, and that the defendants would thereby have the opportunity to appeal against the order, and get the same quashed at the quarter sessions, took no steps to remove the order by certiorari in this Court, in order that the same might be quashed, or otherwise to obtain the quashing of the order; that no service whatever of the order has been made on the defendants since the said 9th of April, 1870, and that the plaintiff ought not now to be admitted to say that the said supposed order was duly served upon the defendants.

To the 6th plea, on equitable grounds, repeating the above several allegations, that the plaintiff ought not now to be admitted to say that the order was duly served upon the defendants according to and in pursuance of the statutes in such case made and provided.

The defendants also demurred to the 2nd plea, and joined in demurrer as to the 1st, 2nd, 3rd, 4th, 6th, and 7th paragraphs.

The prosecutor demurred to the equitable replications to the 5th and 6th pleas, and joined in demurrer to the 2nd plea.

The defendants joined in demurrer to the equitable replications.

Poland (with him *C. Bowen*), for the prosecution. A. Freedman, having been acquitted of murder, was ordered, under 40 Geo. 3, c. 94, s. 1 (1), to be confined during Her Majesty's pleasure, and she being in Newgate, two justices of the city of London made an order in December, 1869, adjudging her place of settlement to be in Shadwell, and ordering the guardians of the Stepney union to pay 14*s.* a week during her confinement in Broadmoor Criminal Lunatic Asylum; and in January, 1870, she was removed to the asylum; but none of the weekly payments having been made, a mandamus was obtained commanding the guardians to pay the

(1) By 40 Geo. 3 c. 94, s. 1, persons indicted for treason, murder, or felony, and acquitted on the ground of insanity, may be ordered to be detained during His Majesty's pleasure.

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sum due. There are several demurrers to the return and pleas, but the main question is whether the justices had power to make the order. The 9 Geo. 4, c. 40, s. 54 (1), gave the power in

(1) By 9 Geo. 4, c. 40, s. 54: "In all cases where any person shall be kept in custody as an insane person by order of any Court, or by His Majesty's order subsequent thereunto, it shall and may be lawful for any two justices of the peace of the county where such persons shall be so kept in custody, to inquire into and to ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person, the place of the last legal settlement, and the circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order, under their hands and seals, upon such parish where they adjudge him or her to be legally settled, to pay such weekly sum for his or her maintenance in such place of custody, as one of His Majesty's principal secretaries of state shall by writing under his hand from time to time direct; and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county where such person shall have been apprehended; but if it shall appear that such person is possessed of such sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expense of the maintenance of such person, in the manner hereinbefore directed: Provided always, that the churchwardens and overseers of the parish in which the justices, or the major part of them, shall adjudge any insane person to be settled, may appeal against such order to the general quarter sessions of the peace to be holden for the county where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace of such county, who shall be respondent in such appeal; which appeal the justices of the peace assembled at the said general quarter sessions are hereby authorized and empowered to hear and determine, in the same manner as appeals against orders of removals are now heard and determined."

By 3 & 4 Vict. c. 54, s. 1, on prisoners becoming insane, two justices may inquire with medical aid into such insanity, and if prisoner certified to be insane, secretary of state may order his removal to lunatic asylum. By s. 2, unless secretary of state otherwise directs, two justices are to inquire into settlement, and make orders on the parish "to pay such weekly sum as they or any two justices shall from time to time direct" for his maintenance in the asylum.

By s. 3, reciting that it was expedient to make it, the same provision is made as to persons charged with misdemeanor as is given by 40 Geo. 3, c. 94, in cases of felony, &c., and power is given to justices to make the same inquiry, &c., as is given "in the cases before mentioned" . . . "and to make the like order for the payment of such person's maintenance as above mentioned." By s. 4, power of appeal is given to any person aggrieved by the order of any justices as aforesaid. By s. 5, "the overseers of the parish in which the justices shall adjudge any

direct terms to two justices of the place in which the criminal lunatic was in confinement, leaving it in the discretion of the secretary of state from time to time to direct the amount to be paid, with a proviso giving an appeal. The 3 & 4 Vict. c. 54, s. 7, after reciting s. 54, repeals so much of it as gave a discretion to the secretary of state; and enacts that such two justices shall direct the amount to be paid weekly. The order was made under this section, and the difficulty arises from the fact that the statute of Geo. 4 is repealed in toto by 8 & 9 Vict. c. 126, s. 1. If the order cannot be made the anomaly will have been enacted, that an order can be made in the case of a prisoner acquitted of misdemeanor, under ss. 2 and 3 of 3 & 4 Vict. c. 54, but no order can be made in the case of felony, although it was obviously the intention of the legislature by that statute to assimilate the cases of misdemeanor and felony. No doubt 9 Geo. 4, c. 40, was repealed, without reserving s. 54, per incuriam, and the Court will construe the Acts so as to preserve the power in cases of felony if possible:

insane person to be settled" or the guardians of the union, "may appeal against such order" to the quarter sessions, using the same terms precisely as in s. 54 of 9 Geo. 4, c. 40. By s. 6, s. 55 of 9 Geo. 4, c. 40, is repealed.

Sect. 7: "And whereas by the said last-mentioned Act (9 Geo. 4, c. 40, s. 54) it was among other things enacted that it should be lawful for two justices of the peace of the county where any person should be kept in custody as an insane person by order of any court, or by His Majesty's order subsequent thereunto, to inquire into and ascertain the circumstances and settlement of such insane person, and to make order for the payment of such weekly sum for his or her maintenance as one of His Majesty's principal secretaries of state should by writing under his hand from time to time direct: And whereas it is expedient that so much of the said Act as relates to such direction to be given by such secretary of state should be repealed, and other provisions made in place thereof: Be it therefore enacted, that so much of the said Act as relates to such directions to be given by such secretary of state shall be, and the same is hereby repealed; and that it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane person, as last aforesaid, to be legally settled, or in case such parish shall be comprised in a union declared by the poor law commissioners, or shall be under the management of a board of guardians established by the poor law commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall by writing under their hands direct."

By 8 & 9 Vict. c. 126, s. 1, 9 Geo. 4, c. 40, is repealed.

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Leeds v. *Wakefield.* (1) The effect of the repeal of a statute which had been incorporated in another statute was considered in *Reg.* v. *Smith* (2), and it was held that the repeal of a statute did not repeal it so far as it had been incorporated in a subsequent statute. So here s. 7 of 3 & 4 Vict. c. 54, may be held to incorporate s. 54 of 9 Geo. 4, c. 40, and so to keep s. 54 alive, notwithstanding the subsequent repeal of the whole statute by 8 & 9 Vict. c. 126; in which case the repeal remains under s. 54. Or s. 7 may be treated as a substantive enactment giving power to such justices to make the order, "such" being explained by the recital; and then s. 5 of 3 & 4 Vict. c. 54 (amended by 27 & 28 Vict. c. 29, s. 6), which gives an appeal in general terms to the guardians of the union of the parish in which the justices shall adjudge any insane person to be settled, will apply to the present case. Secondly, it is objected that the service of the order is bad for not having been accompanied with grounds of settlement, &c. But the phrase "with the like restrictions and regulations" used in s. 54 of 9 Geo. 4, c. 40, and s. 5 of 3 & 4 Vict. c. 54, only applies to the appeal and not to the service of the order, and the appeal is from the service of the order alone: *Reg.* v. *Derbyshire.* (3) Thirdly, it is objected that the order is bad for being made ex parte; but it has been decided that such orders may and ought to be made ex parte: *Ex parte Monkleigh.* (4) Fourthly, it is objected on equitable grounds that the order cannot be enforced because of some mistake or misleading of appellants at quarter sessions; but it is clear that the order, if valid, remains so, until got rid of by appeal. Lastly, it is said that mandamus is not the proper remedy. By s. 48 of 9 Geo. 4, c. 40, the remedy by distress against the overseers was given; that being repealed there is no mode of enforcing the order except by mandamus. Moreover this objection comes too late after the writ has issued: *Reg.* v. *Bristol Dock Co.* (5)

Sir J. B. Karslake, Q.C. (with him *Edward Clarke*), for the defendants. The form of the order shews that the justices assumed to be acting under s. 2 of 3 & 4 Vict. c. 54, which does not apply to the case. But, assuming the form to be sufficient, there was no

(1) 7 E. & B. 258; 26 L. J. (M.C.) 37.
(2) Law Rep. 8 Q. B. 146.
(3) 22 L. J. (M.C.) 147.
(4) 17 L. J. (M.C.) 76.
(5) 2 Q. B. 64.

power to make it since the repeal of 9 Geo. 4, c. 40. It may well have been intentional on the part of the legislature to leave the maintenance of a lunatic felon on the county where he is confined. Secondly, the service of the order was bad. The order is assimilated to an order of removal: *Reg.* v. *Glamorganshire* (1); *Reg.* v. *Newport* (2); and the appeals are regulated by 11 & 12 Vict. c. 31, ss. 1 and 2: *Reg.* v. *Glamorganshire.* (3) *Reg.* v. *Recorder of Shrewsbury* (4) shews that there is no appeal until the order has been served accompanied by grounds of chargeability and particulars of settlement. Lastly, as to 25*l.*, the demand is barred by 22 & 23 Vict. c. 49, s. 1 (5): *Baker* v. *Billericay Union.* (6)

Poland, in reply. As to the last point, 22 & 23 Vict. c. 49, does not apply when there is a statutory obligation to pay, but only to debts voluntarily contracted. A statute of limitations is no answer to a mandamus: *Ward* v. *Lowndes.* (7)

COCKBURN, C.J. This is a mandamus to the guardians of the Stepney union to pay, in obedience to an order of two justices of the city of London, a sum of money for the maintenance of a criminal lunatic at present confined in a public lunatic asylum; and there can be no doubt that if the statute of 9 Geo. 4, c. 40, s. 54, were still in existence this would be a valid order, subject to one or two subordinate points that have been raised questioning its validity. The main objection taken to the order is upon the

(1) 13 Q. B. 561; 18 L. J. (M.C.) 118.

(2) 33 L. J. (M.C.) 155.

(3) 8 E. & B. 694.

(4) 1 E. & B. 711; 22 L. J. (M.C.) 98.

(5) 22 & 23 Vict. c. 49, s. 1. "With respect to any debt, claim, or demand, which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards, the commencement of such half year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the poor law commissioners or poor law board: Provided that the poor law board, by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand."

(6) 2 H. & C. 642; 33 L. J. (M.C.) 40.

(7) 1 E. & E. 940; 28 L. J. (Q.B.) 265.

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ground that the statute 9 Geo. 4, c. 40, has been repealed by 8 & 9 Vict. c. 126, s. 1. But it is said on the part of the prosecution that s. 7 of 3 & 4 Vict. c. 54, which engrafted certain modifications upon s. 54 of the former statute, although the former statute has been repealed, still contains a substantive enactment which is sufficient to support the order. There is no doubt that s. 7 of 3 & 4 Vict. c. 54, was introduced, not so much for the purpose of creating a substantive enactment as for the purpose of modifying the previous enactment of s. 54 of 9 Geo. 4. I suppose by some oversight, when the legislature repealed 9 Geo. 4, c. 40, those who framed the Act had not present to their minds the precise language and form of s. 7 of 3 & 4 Vict. c. 54, and they thought that section would suffice for the purpose of providing for criminal lunatics in the position of the subject of these proceedings. But difficulties are pointed out which certainly are somewhat striking. In the first place, the statute of 9 Geo. 4 had provisions that the justices, before they make the order, shall ascertain the pecuniary means of the lunatic; and also there were provisions with reference to appeal which must have fallen with the repeal of that statute, unless they were so far by implication embodied in s. 7 of 3 & 4 Vict. c. 54, as that they may be considered to be incorporated in it, and therefore kept alive by that section. I confess I am not prepared to go the length of holding that those provisions, which are certainly salutary and essential provisions in the statute of Geo. 4, are kept alive and incorporated by implication in s. 7 of 3 & 4 Vict. c. 54. I do not say it is not so; but entertaining considerable doubt about it, I do not consider it necessary for the purpose of upholding the order made under the 7th section to hold that those provisions in the former statute are embodied in it. I should be rather inclined to think it is an omission on the part of those who framed the Act to deal with this legislation, and by an oversight they have allowed those provisions to drop. The question to which I apply my attention is to see whether, the statute of Geo. 4 having been repealed, there is a sufficiently substantive enactment in s. 7 of 3 & 4 Vict. c. 54, which will suffice for the present purpose. I cannot adopt the view propounded by Sir John Karslake, that the legislature intended to repeal the Act of Parliament upon which that piece of legislation in s. 7 of 3 & 4 Vict. c. 54, is engrafted:

and I cannot suppose the legislature intended anything so exceptional and unusual as that any criminal lunatic confined in a public lunatic asylum should be left there without the parish or union in which such lunatic is settled being called on to contribute to the maintenance of such lunatic; and, therefore, if I can find anything in s. 7 which will suffice for the present purpose, I think I ought to find it.

I pass over the recital in s. 7 for a moment; the enactment in that section is, after repealing a certain portion of s. 54 of 9 Geo. 4, c. 40, "And it shall be lawful for such two justices to direct the overseers of the parish in which they shall adjudge such insane person as last aforesaid to be legally settled," or in certain cases the guardians of the union or parish, as the case may be, "to pay such weekly sum for the maintenance of such person as they or any such two justices shall by writing under their hands direct." The whole of that is complete and perfect in itself, with one exception, namely, that it speaks of the justices by whom such an order is to be made by reference to something else, because it speaks of "such two justices," and I think this want may be supplied by the preamble of the section which recites s. 54 of 9 Geo. 4, c. 40, and the enactment that it shall be lawful for two justices of the county where any person shall be kept in custody as a criminal lunatic, and so forth; so that by reference to that preamble the words "such justices" may be sufficiently explained and rendered certain. It is clear that what the enacting part of s. 7 refers to is two justices of the county where such person is kept in custody. It may be true that that section does not contain all the provisions of 9 Geo. 4, c. 40, s. 54, but there is a substantive enactment; and rather than that such an important provision as that which relates to the maintenance of such a criminal lunatic should be a casus omissus in our legislature, I think we must give effect to that section; and inasmuch as it contains in itself a provision which is applicable to the present case, we should hold it to be so applicable, in which case the order would be valid. I think, therefore, that s. 7 of 3 & 4 Vict. c. 54, is sufficient to meet the present case.

Then says Sir John Karslake, Supposing s. 7 will apply, there are certain conditions to the enforcing of such an order, and these

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conditions have not been satisfied. He argues that this order is analogous to an order of removal. Practically, no doubt, it has the same effect, because the settlement is adjudged to be in the parish or union, the lunatic is adjudged to be chargeable to the parish or union; and although there is no actual removal of the lunatic, who remains in the place of confinement, practically the result is the same thing to the parish as though there was an actual removal. For practical purposes it may be so; but then we have to see whether there is any legislative enactment which makes the provisions of the Poor Law Act relative to orders of removal applicable to such a case as the present. I do not find any. The Act to which Sir John Karslake referred was 11 & 12 Vict. c. 31, which modifies the previous legislation on the subject, namely 4 & 5 Wm. 4, c. 76, s. 79, which provided that notice of chargeability should be accompanied by a copy of the examination. The Act of 11 & 12 Vict. c. 31, after repealing that enactment, in s. 2 substitutes for the copy of the examination a statement in writing under the hands of the overseers or the guardians, setting forth the grounds of the removal, including the particulars of the settlement relied upon in support thereof. What the overseers are to do is to set forth the grounds of removal including the particulars of settlement. Here the guardians could not comply with that; there is no removal, and therefore the enactment does not appear to be applicable to the present case; and I do not think we can impose upon the prosecutor the obligation of accompanying the notice of the order with a statement of the grounds of chargeability or particulars of settlement or anything of that sort. There being no removal there are no grounds to be stated; nor are any particulars of settlement required by the statute under which the present order is made. With regard to the cases which shew that, where the appeal is resorted to, it must be conducted in like manner as an appeal against an order of removal, they do not appear to me to apply in the present instance, because we are not considering the proceedings of appeal, but the proceedings which are to lay the foundation for the order. I do not think, therefore, any provisions of that kind apply to the present case.

With regard to the other point, namely, that only a part of the sum alleged to be due under the order in question can be recovered,

I think Mr. Poland fails to meet that contention on the part of Sir John Karslake. The legislature having enacted by 22 & 23 Vict. c. 49, that all claims, debts, and demands shall be paid within a certain time, the statute begins to run from the time the order is made and served, and unless legal proceedings are taken within that time, the money cannot be recovered. I see no answer to that argument, and therefore I think that upon that ground our judgment must be for the defendants; but with regard to the other demurrers, judgment must be given for the prosecutor.

BLACKBURN, J. I am of the same opinion. The main question turns upon what is the right construction of 3 & 4 Vict. c. 54, s. 7. As things now stand, the statute 9 Geo. 4 is repealed simpliciter. This is an instance of the difficulties which frequently arise from the complication of statutes, one referring to the other, and things happening which those who drew the statute never contemplated. The 9 Geo. 4, c. 40, s. 54, enacted:—[The learned judge read the first part of s. 54.] Then there follows a power of appeal. As that section stood, therefore, it was quite plain that two justices were to inquire into the legal settlement of the lunatic, and they were also to inquire whether he had any means, and if he had no means so that he could be supported out of his own property, then an order was to be made upon the parish to pay such sum as the secretary of state should from time to time direct. At that time there was no power with regard to persons having been detained in custody charged with misdemeanors who had been acquitted upon the ground of insanity. Then by s. 3 of 3 & 4 Vict. c. 54, it is enacted that where a person charged with misdemeanor has been found not guilty on the ground of insanity he shall be detained, "and in all such cases two justices of the peace of the county, city, or place where such person shall have been acquitted on account of insanity, or shall be kept in custody, shall have the like power as is given in the cases before mentioned,"—that is, when a prisoner has become insane while in prison,—"to inquire and ascertain the last legal settlement of such insane person, and also to make the like order or orders for the payment of such person's maintenance, and the other charges as above mentioned"; that is, they are to have power to make an order for such weekly sum as they or any two

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justices shall from time to time direct. Then follows, in ss. 4 and 5, a power of appeal. So far as I have gone the statute of 9 Geo. 4 was left untouched; and it would follow, therefore, if the legislation stopped there, that the power of the two justices to make an order in the case of a person who was found insane upon a charge of felony would have been the same as formerly, namely, they would have been obliged to make the order on the place of settlement to pay such sum as one of the secretaries of state might under his hand direct. But then, certainly in a very clumsy and inartificial way, perhaps to be accounted for by the provision being put in by committee after the bill had been drawn, s. 7 of 3 & 4 Vict. c. 54, enacts:—[The learned judge read s. 7.] Taking it as those two statutes stood, it would appear clearly that the part of s. 54 of the statute of Geo. 4 which said that the payment of the weekly sum was to be directed by the secretary of state was repealed, and the cases of persons acquitted of misdemeanor and of felony on the ground of insanity were placed on precisely the same footing. Then comes the substantial difficulty, namely, that in the subsequent Act of 8 & 9 Vict. c. 126, the statute of 9 Geo. 4 is altogether repealed simpliciter. It is extremely embarrassing under those circumstances for us to say what it was the intention of the legislature to express. If it were necessary to decide whether a power of appeal were given, and under what circumstances, I should require a great deal more time to consider before giving a final opinion; more especially after what my Lord has said. At present the inclination of my opinion is not quite the same as that of the Lord Chief Justice. The present inclination of my opinion as to the effect of s. 7 is this:—When we find in s. 7 that the former enactments of the statute 9 Geo. 4 shall be altered in some respects, and when it is so altered, we find that such two justices shall make the order for such sum as the justices may think fit, I think that, if necessary, it should be considered in the same way as if they had altered the enactment of 9 Geo. 4, and all were re-enacted with the alteration in the words of s. 7; so that, according to my view, the effect of s. 7 would be really this: Two justices shall make the inquiry as in 4 Geo. 4, and if they find that the lunatic has no means of his own, they will then make an order to pay such a sum as two justices may

appoint, subject to an appeal, exactly as in the Act of Geo. 4. That is, taking the words and expanding them, and giving the like effect to them as Lord Coke said of Littleton's "et cæteras," namely, that in his et cæteras much is implied. (1) No doubt, a good deal is implied on this construction, but according to the best opinion I can form, that is the result; and when once that is established, the order is to be made subject to appeal, which appeal is to be subject to all the same restrictions and regulations as an appeal against an order of removal.

A valid order, therefore, having been made and served, there is an objection raised that it is inoperative, because no grounds of chargeability and particulars of settlement were served with it. I think, as soon as the mode in which the grounds of chargeability and the necessity for sending them as provided by the legislature is looked at, the objection will be found to be founded upon a misapprehension, and that we are not embarrassed by the objection at all. The original matter arose in 4 & 5 Wm. 4, c. 76, the Poor Law Act (1), in which, by s. 79, it was enacted that the pauper should not be actually removed under any order of removal from any parish by reason of his being chargeable to or relieved therein until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy of the order of removal and of the examination upon which such order was made, shall have been sent by post or otherwise by the overseers of the parish obtaining such order to the overseers of the parish to whom such order shall be directed. That was the provision, and the construction put upon that—whether rightly or wrongly is not now for us to inquire—was that, inasmuch as the making of the order of removal in itself was no hardship upon nor caused any wrong to the parties at all, it was only when it had been served under such circumstances as made the removeability follow from it that there was a grievance; and it was held that there could be no notice of appeal until not only the order of removal was served, but, as the law then stood, accompanied also by a copy of the examination upon which such order was made. Then, by a subsequent Act (11 & 12 Vict. c. 31) sending the examination was done away with, and instead of it was substituted, by s. 2, that the grounds

(1) See Co. Litt. 173 b.

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of removal, including particulars of settlement, should be sent. The consequence remained, that notice of appeal could not be given till these grounds were served with the order of removal, because there was no grievance until the person could be removed. The time of appeal, after grievance, was regulated in a great many ways to which I need not now refer. The argument, as I understand it, of Sir John Karslake, is this, that inasmuch as the appeal in the present case is to be subject to all the rules and regulations of an appeal against an order of removal, and as there is a rule or regulation which says the order of removal shall be no grievance in itself until it has been served with grounds of removal and particulars of settlement which will enable them to remove him, so the order of maintenance cannot be operative until it has been served with grounds of chargeability and particulars of settlement. But in the present case the lunatic never can be removed. She has been detained in prison. It is an order of maintenance, not of removal; consequently all the enactments that apply to the time when the lunatic pauper may be removed under ordinary circumstances, and what may constitute a grievance against which there is an appeal, do not apply. There was here a grievance as soon as the order was served; consequently, I think all the cases which Sir John Karslake cited in no way touch the present case, and the absence of the grounds of chargeability is no ground at all to prevent the order being enforced.

With reference to the fact that the quarter sessions decided the other way, and were wrong, and the fact of their having been induced so to do by the learned counsel on behalf of his client, that does not really amount to an estoppel. I cannot understand upon what principle it is said that the facts stated in these equitable replications are an objection on the return to the mandamus. If there had been any case of that kind made when the rule was asked for, namely, that the one party had induced the quarter sessions to decide wrongly, and the other had been jockeyed out of their appeal, that might have been an excellent reason for saying we would not grant the mandamus, but it is no answer after the mandamus has been granted.

There remains one other question, and that is, whether the statute 22 & 23 Vict. c. 49, s. 1, is a bar to that part of the

demand to which it is pleaded. I think it is. The effect of that enactment is that when demands or claims are made against a parish, they must be paid within three months after the six months within which they accrue. The object of that is to prevent stale demands coming upon the ratepayers. Mr. Poland endeavoured to argue that this must be applied only to things arising on contract, but the words "claim or demand" would cover everything; and therefore I see no reason at all why a demand or claim like the present should not be paid as promptly within the nine months as any other. The effect of the statute is, that if you commence litigation to recover it within nine months, then they cannot avoid it by delaying you by process of law; but if you do not commence litigation within nine months, the claim is barred. Here, as to 25*l.*, they had not commenced litigation in time, consequently that is barred.

With regard to costs, 6 & 7 Vict. c. 67, s. 1, enacts that, on giving judgment on demurrer in the case of a mandamus, "it shall be lawful for the said Courts respectively and they are hereby required, in and by their said judgment, to award costs to be paid to the party in whose favour they shall thereby decide by the other party."

COCKBURN, C.J. The prosecutor has suceeded in the main question, and is entitled to judgment that a peremptory mandamus issue.

BLACKBURN, J. On the taxation of costs, costs will be allowed to the defendants as to those demurrers on which they have succeeded.

PER CURIAM:

Judgment accordingly.

Attorney for prosecution: *Solicitor to the Treasury.*
Attorney for defendants: *Swepstone.*

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May 1.

MELLOR *v.* WATKINS.

Landlord and Tenant—Effect of Surrender of Lease on Interest of Sub-Lessee—Parol Licence, Revocation of—Rights of Licensee.

At Michaelmas, 1851, W., the owner of two adjoining houses, Nos. 4 and 5, let No. 5 to A., as tenant from year to year. Defendant having become tenant to W. of No. 4, A. let him the cellars under No. 5, from year to year from Michaelmas, 1861. There was in the front cellar a gas meter communicating with the house No. 5, and it was a term of the letting that A. should be allowed to go to the meter, if necessary, whenever defendant's premises were open. In July, 1871, it was agreed between A., W., and D., that A. should give up possession of No. 5 to W., and D. became tenant from year to year to W. from Michaelmas, 1871. Defendant was aware that No. 5 was given up by A., and re-let to D., but no notice to quit the cellars was given to defendant. In March, 1872, D. put up in the cellars a water meter communicating with his house, without either objection or express permission of the defendant. Afterwards D. surrendered his interest in favour of the plaintiff, and W. let No. 5, expressly including the cellars, to the plaintiff for fourteen years, from the 24th of June, 1872. The plaintiff entered into occupation, the cellars remaining occupied by the defendant, and plaintiff, without objection or permission of the defendant, put up more pipes and some bell-wires in the cellars. In July, 1872, plaintiff demanded possession of the cellars, but defendant refused to give them up without a proper notice to quit, and he retained possession till April, 1873. On the 10th of January, 1873, the defendant cut off the plaintiff's water supply by hammering up the service pipe passing through the cellars, and cut the gas pipes and bell-wires. Plaintiff having brought an action for being kept out of possession of the cellars and for the damages caused by defendant's cutting the pipes, &c.:—

Held, that defendant was entitled to keep possession until a proper notice to quit had been given; for that the voluntary surrender by A. could not affect the interest of the defendant, his sub-lessee.

Secondly, that plaintiff was entitled to damages for the cutting of his pipes and wires; for that a licensee, under a revocable licence, was entitled to notice of revocation and a reasonable time afterwards to remove his goods.

Cornish v. *Stubbs* (Law Rep. 5 C.P. 334), followed on the latter point.

Case stated by an arbitrator under an order at Nisi Prius, without reference to the pleadings.

This was an action to recover damages from the defendant for keeping the plaintiff out of possession of the cellars of a house, No. 5, Holyrood Terrace, Malvern, and for damaging the gas-pipes, water-pipes, and bell-wires of the said house, which passed through the same cellars.

In 1851, Joseph Williams, the owner of a row of houses, Holyrood

Terrace, let the house No. 5 to Mr. James Allen, senior, as tenant from year to year, from the 29th of September, 1851, and Allen entered and continued in possession until the change of occupation hereafter mentioned.

In 1854 Messrs. Green, wine merchants, were occupying the adjoining house, No. 4, as tenants to Williams, and they applied to Allen to let them the back cellars under No. 5, for the purposes of their business. Allen agreed to let them these cellars at 8*l.* a year, and they accordingly took possession of them.

Allen retained possession of the front cellar, and about the same time that he let the back cellars to Messrs. Green, he put a five-light gas metre in the front cellar, with a service pipe therefrom to the part of the house which was used as a shop, but this pipe did not pass through any part of the back cellar, nor was the gas at that time conveyed to any other part of the house.

In 1861 Messrs. Green became bankrupt, and the defendant took over their business, and became tenant of No. 4 to Williams.

In the same year the defendant, having entered into possession of No. 4 and the back cellars of No. 5, applied to Allen to let him the front cellar under No. 5, in addition to the back cellars previously let to Messrs. Green; and thereupon it was agreed between him and Allen that he should become a yearly tenant of the whole of the cellars under No. 5, from Michaelmas, 1861, at the rent of 14*l.* 10*s.*, it being a term of the letting that Allen should be allowed to go down to the meter and do anything that was required to the gas supply whenever defendant's premises were open.

Williams knew that the cellars were let to the defendant at the rent above-mentioned, but had no further knowledge of the terms of the letting.

In 1866, Allen gave up the occupation of No. 5 to his son, James Allen, junior, but remained tenant of the house to Williams.

In June, 1871, James Allen, junior, failed, and filed a petition for the arrangement of his affairs by liquidation under the Bankruptcy Act, 1869. In July of that year, it was arranged between James Allen, senior, James Allen, junior, the trustee under the liquidation of James Allen, junior, Williams, the landlord, and

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James Davis, that James Allen, senior, and his son should give up the house to Williams, and that he should let it to Davis, who had also arranged to take the fixtures and furniture on the premises. In the same month possession of the house, and furniture, and fixtures, but not of the cellars, was given to Davis.

On the 23rd of December, 1871, by agreement in writing, Williams let the house No. 5 to Davis as tenant from year to year, from Michaelmas day then last past.

The defendant was then aware that the house was given up by the Allens and re-let to Davis; but no notice to quit the cellars was given him.

In March, 1872, Davis agreed to surrender his interest in favour of the plaintiff, and accordingly, in June of that year, he gave up his agreement to Williams to be cancelled, and the same was cancelled accordingly.

On the 1st of June, 1872, by deed of that date, Williams let the house No. 5, expressly including the cellars, to the plaintiff for the term of fourteen years from the 24th of June then instant.

At the time of the execution of this lease, the plaintiff knew that the defendant was in occupation of the cellars, but he did not know the terms on which he held them.

From the time of the failure of James Allen, junior, in June, 1871, the defendant paid no rent for the cellars to any one, not knowing who was, under the circumstances above detailed, legally entitled to receive the rent from him.

At some time during the occupation of James Allen, junior, a ten-light gas meter had been substituted for the five-light meter in the front cellars of No. 5, and gas supplied from it to other parts of the house by pipes passing through the back cellars. This was done without objection on the part of the defendant, but without his permission being asked or given.

In March, 1872, while Davis was in occupation of No. 5, a water meter was fixed in the front cellar by the order of Williams, with a service pipe passing therefrom to supply the house. This was also done without objection on the part of the defendant, but without his permission being asked or given.

On the 24th of June, 1872, the plaintiff entered into occupation of the whole of the house, No. 5, except the cellars which were

occupied by the defendant, and put some additional pipes into the cellars, so as to convey an additional supply of gas from the gas meter to his house and shop. He also put up bell-wires, running through the cellars from the front to the back part of his premises above. This was also done without objection or permission on the part of the defendant.

On the 9th of July, 1872, the plaintiff gave notice to the defendant that he should require the immediate possession of the cellars from the defendant; but after some correspondence, the defendant refused to give up possession, alleging that he was entitled to retain possession until he received a proper notice to quit; and he did not give up possession until the 10th of April, 1873.

On the 10th of January, 1873, defendant cut off the plaintiff's water supply by hammering up the main service pipe passing through the front cellar from the water-meter to the house above. He at the same time cut off the plaintiff's supply of gas at the gas-meter, and severed the bell-wires which ran through the cellars. The plaintiff was deprived of his gas and water supply, and of the use of the bells, for five days, at the end of which time the supply of gas was restored, and the supply of water partially restored, but the bell-wires remained unserviceable till the defendant gave up possession, on the 10th of April.

The questions for the opinion of the Court were, first, was the plaintiff entitled as against the defendant to the possession of the cellars from the 29th of September, 1872? Second, was the plaintiff entitled to the use and benefit of the water service, gas service, and bell-wires in the cellars on the 10th of January, 1873?

The arbitrator assessed the damages which the plaintiff has sustained by being kept out of possession of the cellars, at 45*l.*, the damages which he has sustained through the interference with his water supply, at 15*l.*, the damages which he has sustained through the interference with his supply of gas, at 3*l.*, and the damages which he has sustained through the interference with his bell-wires, at 40*s.*

Sir H. James, Q.C., for the plaintiff. It must be admitted that it has been decided that no voluntary act of a lessee in surrender-

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ing, or otherwise putting an end to his tenancy, can affect the interest of his under-tenant. And therefore a notice to quit was necessary to determine the defendant's tenancy of the cellars; but he appears to have had constructive if not actual notice to quit, in December, 1871, more than six months before the 29th of September, 1872. On the second point, although a licence, unless by deed, is revocable at any time, still reasonable notice and time to remove the goods ought to be given. This principle was assumed in the judgment in *Wood* v. *Leadbitter*. (1)

Baylis, for the defendant. It is clear that the defendant was entitled to retain possession of the cellars, no notice having been given to him when the plaintiff took possession of the house, No. 5. On the second point, the defendant had a right to oust the plaintiff, who was a mere licensee by parol.

[BLACKBURN, J. No doubt the licence was revocable at any time; but the proposition contended for by Sir H. James is most reasonable. Surely there must be some case on the point. *Liggins* v. *Inge* (2) and *Wood* v. *Manley* (3) go some way towards supporting the plaintiff's contention.

LUSH, J. The case of *Cornish* v. *Stubbs* (4), seems directly in point.] [The learned judge then read the facts of that case and the judgment of Willes, J.]

COCKBURN, C.J. On the first question, our judgment must be for the defendant, viz., that the voluntary surrender of Allen of his interest could not affect the defendant's underlease of the cellars. If Allen had continued lessee, the defendant's interest could not have been determined except by a notice to quit, and the surrender of Allen's lease leaves the defendant's underlease untouched. Sir H. James admitted that there had been no notice to quit, and, moreover, that Allen could not by giving notice to his landlord determine the underlease; but he argued that the defendant was aware of the surrender, and so in some way was affected with notice; but when the time came he refused to go out without a proper notice, and stood upon his rights. It is clear that when a person voluntarily surrenders his lease, he cannot by

(1) 13 M. & W. 838.
(2) 7 Bing. 682.
(3) 11 Ad. & E. 34.
(4) Law Rep. 5 C. P. 334, 339.

so doing put an end to an undertenancy created by himself; and therefore there must be judgment for the defendant on the first point, on the ground that an underlessee's rights cannot be put an end to by a voluntary surrender of his lessor's interest.

On the other point, principle, reason, and common sense alike require that, although a licence may be revocable at any moment, the licensee should have a reasonable time for removing off the premises what he has been licensed to put upon them; and the judgment of the Court of Common Pleas in *Cornish* v. *Stubbs* (1), fully upholds that proposition; and on the rest of the case therefore there must be judgment for the plaintiff.

BLACKBURN, J. I am of the same opinion. Allen had no power to derogate from his landlord's rights. Subject to those rights, he had a right to sub-let; and by doing that he could not prevent the landlord from giving a notice to quit in invitum, which would have determined both Allen's and the defendant's interest. But no voluntary act on the part of Allen, by which his own interest might be determined, could put an end to the interest which he had created in the defendant. Allen's tenancy was put an end to as far as he was concerned, as between him and Williams, by the voluntary surrender of his lease; but the defendant's tenancy in the cellars still remained, until determined by a proper notice to quit. No notice however had been given previous to the plaintiff's coming into possession, in July, 1872, and no subsequent notice could operate till the end of the year of tenancy next after six months had elapsed. So that the defendant clearly had the right to possession as against the plaintiff on the 29th of September, 1872. Sir H. James said that the defendant had constructive notice; I confess I could not follow his argument, and he cited no case in support of his proposition.

On the other point, it seems but reasonable that the person giving the licence, though revocable at any time, must give the licensee sufficient time to remove the articles from the premises; and, at all events, that he is bound to give the licensee reasonable notice; none whatever appears to have been given here. I am happy to find that this position has already been established by

(1) Law Rep. 5 C. P. 334.

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the case of *Cornish* v. *Stubbs* (1), in which the judgment of Willes, J. goes most fully into the principle, and is amply sufficient to govern the present case.

LUSH, J., concurred.

Judgment for the defendant as to the possession of the cellars; for the plaintiff, as to the rest.

Attorneys for plaintiff: *T. H. Smith.*
Attorneys for defendant: *Brook & Chapman.*

May 4.

EX PARTE TRENCHARD.

Attorney and Solicitor—Articled Clerk—Service under former Articles—Cancellation of Articles by Mutual Consent—6 & 7 Vict. c. 73, s. 13.

In October, 1856, T. was articled to his father, an attorney, and duly served for two years; when, becoming out of health, he was recommended by his medical attendants to follow some more active occupation, and his father obtained him a commission in the army in June, 1859. In 1870, his health being re-established, he sold out of the army, and entered into fresh articles with his father early in 1871, and duly served up to May, 1874. An application was then made that the two years under the original articles might be allowed to be reckoned as part of the five years' service under the fresh articles:—

Held, by Cockburn, C.J., Quain and Archibald, JJ. (Blackburn, J., having doubts on the first point), that the facts amounted to a virtual cancellation by mutual consent of the first articles; and the case therefore came within s. 13 of 6 & 7 Vict. c. 73, and that the application might be granted.

APPLICATION on behalf of H. M. Trenchard, an articled clerk, that the period of two years and eighteen days under former articles may be reckoned as part of the five years' service under articles of clerkship of the 8th of February, 1871.

The applicant was on the 22nd of October, 1856, then being eighteen years of age, articled to his father, an attorney of Taunton. He served for two years and eighteen days from the date of the articles till the 9th of November, 1858, and then became out of health and unable to follow his intended profession; and his medical attendants urged his seeking more active occupation.

(1) Law Rep. 5 C. P. 334, 339.

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Accordingly his father obtained him a commission in the army, on the 3rd of June, 1859. On the 17th of January, 1870, his health being re-established, he applied to this Court to be permitted to continue his service under the articles, and that the term of two years and eighteen days already completed might be reckoned as part of the original five years. The Court refused the application, leaving it open to the applicant to apply to have such period computed when he should have served a sufficient time under fresh articles. He accordingly sold out of the army on the 28th of January, 1870, and commenced service with his father on the 20th of May, 1870, when he passed his preliminary examination; and he entered into fresh articles with his father on the 8th of February, 1871, the delay in executing the articles having been caused by the difficulty in getting the stamp duty remitted on the fresh articles. He had duly served ever since.

Lopes, Q.C., in support of the application.

[COCKBURN, C.J. Under what section of the Act is the application made?]

Under s. 13 of 6 & 7 Vict. c. 73. (1) An application was made in January, 1870, to the Court, but the Court said it was premature, according to the case of *Ex parte Keddle* (2), overruling the former decision in *Ex parte Smith.* (3) The present application is not to allow any time during which the clerk has not actually served to

(1) 6 & 7 Vict. c. 73, s. 13: "If any attorney or solicitor to or with whom any such person shall be so bound, shall happen to die before the expiration of the term for which such person shall be so bound, or shall discontinue or leave off practice as an attorney or solicitor, or if such contract shall by mutual consent of the parties be cancelled, or in case such clerk shall be legally discharged before the expiration of such term by any rule or order of the Court wherein such attorney or solicitor shall have been admitted, such clerk shall and may, in any of the said cases, be bound by another contract or other contracts in writing to serve as clerk to any other practising attorney or solicitor, or attorneys or solicitors, during the residue of the said term, and service under such second or other contract in manner hereinbefore mentioned shall be deemed and taken to be good and effectual, provided that an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time and in the manner hereinbefore directed, and subject to the like regulations with respect to the original contract and affidavit of the execution thereof."

(2) 4 B. & S. 993; 34 L. J. (Q.B.) 136.

(3) 1 E. & E. 928; 28 L. J. (Q.B.) 263.

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count, but only that the two years actual service under the first articles may be allowed to count as part of the five years under the fresh articles.

[BLACKBURN, J. How is the case brought within s. 13?]

It may be inferred from the facts, that the former articles were cancelled by mutual consent.

COCKBURN, C.J. I think that the first articles of clerkship were virtually cancelled by mutual consent. I infer this from the fact that the father allowed the son to get a commission in the army; for it is only by permission that an officer can sell out, and in time of war he cannot do so at all; so that the father must have known that his son was entering into a service from which he could not be emancipated at any moment. I think the statute ought to receive a liberal construction. No doubt it was passed for the purpose of securing that persons admitted to the profession of attorney and solicitor should receive proper instruction, as well as to secure respectability; and I do not think our present decision in favour of the applicant will in any way interfere with those objects.

BLACKBURN, J. I quite agree the application should be granted, if we can see our way to saying that the first articles were cancelled by mutual consent. But, from the affidavit, I should draw the conclusion that they were not.

QUAIN, and ARCHIBALD, JJ., concurred with the Lord Chief Justice.

Rule granted.

Attorney for applicant: *Trenchard, Taunton.*

OLIVER *v.* THE NORTH EASTERN RAILWAY COMPANY. 1874

Railway Company, Liability of, for Improper State of Level Crossing. *May* 8.

Where a railway company construct their line across a highway on a level under the sanction of an Act of Parliament, it is their duty to keep the crossing in a proper state for the passage of carriages across the rails; and if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company are liable.

DECLARATION, that defendants were possessed of a railway which crosses at a level a highway, and defendants had the management and control of the railway at such level crossing; and it was the duty of defendants to keep the rails in such a state that all persons lawfully using the highway might do so with safety to themselves and their carriages, yet defendants so improperly and unskilfully conducted themselves in that behalf that the rails became in an unfit condition and dangerous to persons using the highway with carriages; and plaintiff's carriage, which he was driving in the highway and across the railway, was greatly damaged.

There was a second count laying the duty of defendants to keep the rails and soil of the road in a proper condition, and that defendants left the rails too high above the surface of the road.

Pleas: 1. Not guilty.

2. That the acts complained of were lawfully done by defendants under 5 Vict. sess. 2, c. xxviii. (Stanhope and Tyne Ry. Act); 21 & 22 Vict. c. cxvi. (Stockton and Darlington Ry., &c.); and 26 & 27 Vict. c. cxxii. (North Eastern and Stockton Ry., &c.)

Issue joined.

At the trial before Pollock, B., at the Durham Spring Assizes, 1873, it appeared that the plaintiff was driving a four-wheeled dog-cart along the highway at Carrhouse, where the Stanhope and Tyne Railway (which belongs to the defendants) crosses the highway on a level; and, according to the plaintiff's evidence, in consequence of the rails being too high above the level of the road, the hind wheels of the cart were caught by the rails, and the carriage was torn in two. It appeared that the level crossing

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had been constructed before any of the defendants' special Acts of Parliament were passed, but this part of the railway was expressly mentioned in the Acts; and it was contended, on behalf of the defendants, that they were in the same position as if the level crossing had been originally constructed under the express sanction of an Act of Parliament, and that no duty was imposed on a railway company to keep in repair a public highway; but the judge expressing an opinion against that contention, witnesses were called on behalf of defendants who spoke to the level crossing being in a proper state.

The learned judge told the jury that, as to the duty of the railway company with regard to the rails at the level crossing, they must consider the case as if the company had had the express sanction of an Act of Parliament to put the rails there. In such a case the company would have power to put down such rails as are necessary for the purposes of the line; but the rails must be laid and kept so as to cause as little injury or danger as possible.

The jury found a verdict for the plaintiff for 20*l.*

A rule was obtained for a new trial on the ground of misdirection in telling the jury that defendants were under an obligation to repair and keep in repair the roadway of the level crossing.

C. Russell, Q.C., and *J. Edge* shewed cause. The defendants were not in the same position as if they had had the express sanction of an Act of Parliament previous to the making of the level crossing: *North Eastern Ry. Co.* v. *Leadgate Local Board.* (1) But assuming that the defendants were in the same position, still the sanction of the Legislature only authorized the doing of the act without negligence.

[BLACKBURN, J. In *Rex* v. *Kerrison* (2) it was held that where persons were authorized by statute to create what would otherwise amount to an indictable nuisance, such as making cuts across a highway, they were bound without any express enactment to put and keep up for the public a proper substitute for the old way, such as a bridge. The principle of that case is expressly in point.]

Reg. v. *Ely* (3) adopts the principle of that case, and the

(1) Law Rep. 5 Q. B. 157. (2) 3 M. & S. 526.
(3) 15 Q. B. 827; 19 L. J. (M.C.) 223.

principle is fully enunciated in the judgment of the Court. (1) The same principle had been acted upon in the previous case of *Rex* v. *Lindsey*. (2) [They also referred to *Wyatt* v. *Great Western Ry. Co.* (3); *Leech* v. *North Staffordshire Ry. Co.* (4), and the notes to *Rex* v. *Stoughton*. (5)]

Holker, S.G. (*Waddy, Q.C.*, with him), in support of the rule. The liability of a railway company, where they are authorized to make their line across a highway on a level, is measured by the duty imposed in s. 47 of the Railways Clauses Consolidation Act (8 Vict. c. 18), viz. to erect gates and keep them closed except for the passage of carriages, &c.; and, this duty being expressly imposed, no further duty or liability can be inferred. *Rex* v. *Kerrison* (6) is inconsistent with *Rex* v. *Kent* (7), where it was held that the county, and not the person who had erected a bridge, was bound to keep it in repair. So here, the company having laid down the rails, it was the duty of the surveyor of highways to see that the roadway was kept up to the level of the rails; and if this is not done, the company are not to be held responsible.

COCKBURN, C.J. The principle of the case of *Rex* v. *Kerrison* (6), and the other cases cited, clearly applies to this case.

PER CURIAM (Cockburn, C.J., Blackburn, Lush and Quain, JJ.):

Rule discharged.

Attorney for plaintiff: *J. Tucker.*

Attorneys for defendants: *Doyle & Edwards, for Nixon, Barnard Castle.*

(1) 15 Q. B. at pp. 843–844; 19 L. J. (M.C.) at p. 232.
(2) 14 East, 317.
(3) 6 B. & S. 709; 34 L. J. (Q.B.) 204.
(4) 29 L. J. (M.C.) 150.
(5) 2 Wms. Saund. 157.
(6) 3 M. & S. 526.
(7) 2 M. & S. 513.

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KNIGHT, APPELLANT; HALLIWELL, RESPONDENT.

Vaccination—Information for not procuring the Vaccination of Child—Limitation of Time at which Information is to be laid—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Vaccination Act*, 1871 (34 & 35 *Vict. c.* 98), *s.* 11—*Practice—Case stated by Justices under* 20 & 21 *Vict. c.* 43—*Points of Law not raised before Justices may be considered by Court.*

By s. 11 of 34 & 35 Vict. c. 98, any complaint may be made and any information laid for an offence under the Vaccination Acts, 1867 and 1871, at any time not exceeding twelve calendar months from the time when the matter of such complaint or information arose, and not subsequently.

On the 10th of May, 1872, the appellant received a notice under s. 31 of 30 & 31 Vict. c. 84, requiring him to have his child vaccinated within fourteen days. Having disregarded the notice, on the 24th of June, 1873, he was summoned before justices, who made an order that the appellant should procure the child to be vaccinated:—

Held, that the information having been laid at a time exceeding twelve months from the time the matter of such complaint (that is, the giving of the notice) arose, the appellant could not be convicted without a fresh notice being given.

The Court will hear and determine questions of law arising on the facts stated by justices under 20 & 21 Vict. c. 43, s. 6, although they were not taken before the justices, or expressly reserved for the consideration of the Court.

CASE stated by a justice of the borough of Wigan under 20 & 21 Vict. c. 43.

On the 24th of June, 1873, an information was laid by the respondent, being an officer appointed by the guardians of the Wigan Union to prosecute persons charged with offences against and otherwise to enforce the provisions of the Vaccination Acts of 1867 and 1871 (30 & 31 Vict. c. 84, and 34 & 35 Vict. c. 98), and being the registrar of births and deaths for the sub-district of Wigan, before a justice of the peace, against the appellant that he, the respondent, had reason to believe that J. Knight, a child under the age of fourteen years, being within the union, had not been successfully vaccinated, and that he had given notice to the appellant, the father of such child, to procure its being vaccinated, and that this notice had been disregarded, and praying that the appellant might be summoned to appear and answer to the information, or to shew cause why an order should not be made directing the child to be vaccinated.

A notice, dated the 10th of May, 1872, was given by the re-

spondent to the appellant, requiring him to have his child vaccinated within fourteen days of the date thereof, pursuant to s. 31 of 30 & 31 Vict. c. 84.

At the hearing the appellant admitted the facts that he was the father of the child, that he had received a copy of the notice, and that the child had not been vaccinated. It was also proved by the respondent, by the production of the minute book of the board of guardians, that he had been duly appointed vaccination officer for the Wigan district.

It was admitted by the respondent that the notice was the only notice that had been given to the appellant, and that proceedings had been previously taken against the appellant for disregarding such notice, and that the appellant had been repeatedly convicted for failing to comply with the notice.

It was contended on behalf of the appellant that, in order to comply with the provisions of the section, it was necessary that a fresh notice should be given before each occasion on which proceedings against the appellant were taken, and that the appellant could only be convicted once for non-compliance with such notice, as the notice became exhausted after the appellant had been once convicted for not complying therewith.

It was also contended on behalf of the appellant that, in order to comply with the provisions of the section, it was not sufficient for the respondent to have been appointed vaccination officer of the district, but that it was necessary that a special resolution should be passed by the guardians authorizing the respondent to take proceedings in each particular case.

It was contended on behalf of the respondent that the notice was sufficient within the meaning of the section, and that there was nothing in that section to support the contention that a fresh notice ought to be given previous to the laying of each information, but that a person might be summoned and convicted any number of times for disregarding one and the same notice.

It was also contended on behalf of the respondent that it was the duty of the respondent, as a duly appointed vaccination officer, to institute proceedings against all persons refusing to obey the statute, and that no special resolution was necessary to authorize the respondent to take proceedings in each particular case.

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The justice was of opinion that none of the objections raised on behalf of the appellant were valid, and therefore made an order directing the child to be vaccinated, and that the appellant should procure its being vaccinated within the space of fourteen days from the 3rd of July.

The questions for the opinion of the Court were, first, whether or not the notice of the 10th of May, 1872, is a sufficient notice within the meaning of the section upon which to ground the proceedings, notwithstanding that the appellant had been previously convicted for disregard of such notice. Secondly, whether the resolution appointing the respondent the vaccination officer to enforce the provisions of the Vaccination Acts is sufficient to warrant him in taking these proceedings without a special authority from the guardians to take proceedings in each case.

T. Baker (*McConnell* with him), for the appellant. First, this is an information laid under s. 31 of 30 & 31 Vict. c. 84, which applies only to the vaccination of children born before the Act passed, and has no application to the present case. The information ought to have been under ss. 16 and 29 of that Act. Here the appellant has once been convicted, and, in order to obtain a second conviction for a second offence, under s. 16, it is requisite to give the parent a fresh notice. *Allen* v. *Worthy* (1) was a decision under s. 31 of 30 & 31 Vict. c. 84. Secondly, the resolutions of the board of guardians only appointed the respondent the vaccination officer; there is no separate resolution authorizing him to enforce the provisions of the Act. There is also another point. After the decision of *Allen* v. *Worthy* (1), 34 & 35 Vict. c. 98, was passed. By s. 11 any complaint or information may be laid for an offence under the Vaccination Acts 1867 and 1871 at any time not exceeding twelve months from the time the matter of such complaint or information arose, and not subsequently. The notice was given to the appellant on the 10th of May, 1872, and the information was laid on the 24th of June, 1873, more than twelve months after; there ought, therefore, to have been a fresh notice, and the information cannot be supported. [He was then stopped.]

(1) Law Rep. 5 Q. B. 163.

The Court intimated that the first two points were untenable, but would hear

J. Edwards, for the respondent, on the last point. The notice to vaccinate the child was given on the 10th of May, and was disobeyed. That was an offence for which the appellant could be punished, but there is a continuing offence from day to day so long as the child remains unvaccinated, for which the appellant is liable to be punished, and the period of twelve months runs from the last disobedience, which is the matter of complaint. This point, however, was not taken before the justices, and the Court will therefore not entertain it. In *Purkis* v. *Huxtable* (1), the Court would not allow a party to take an objection which was not raised before the justices.

T. Baker was not heard in reply.

COCKBURN, C.J. I am clearly of opinion that there is nothing in the points raised in the case. As to the first, the decision of this Court in *Allen* v. *Worthy* (2) is precisely in point, and the grounds of that decision have not been affected or removed by the recent statute, 34 & 35 Vict. c. 98. As to the question raised during the argument, were it not for this last Act there would have been a continuing offence, and the appellant would have been liable to be convicted. But s. 11 has introduced a provision that any complaint may be made for an offence under the Vaccination Acts 1867 and 1871 at any time not exceeding twelve months from the time when the matter of such complaint arose, and not subsequently. It is true that when a notice is given there is a continuing cause of complaint so long as it is disregarded; yet inasmuch as the section says that the complaint shall be made at a time not exceeding twelve months from the time when the matter of complaint arose and not subsequently, it limits the proceedings to twelve months from the day mentioned in the notice: consequently when the year expires there must be a fresh notice. The legislature have introduced this provision, and we are bound by it, but no great inconvenience will arise from our decision, the only effect will be that a fresh notice will have to be

(1) 1 E. & E. 780; 28 L. J. (M.C.) 221. (2) Law Rep. 5 Q. B. 163.

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given every twelve months in cases where the former notice has been disregarded.

Mr. Edwards says that the Court ought not to act upon an objection which arose merely in the course of the discussion, and that the point was not raised before the justice, and is not reserved by him for our opinion. But looking at the language of the statute (20 & 21 Vict. c. 43), under which the case is stated, I find by s. 6 the Court shall hear and determine the questions of law arising thereon. I think, therefore, any objection of law which arises from the facts stated in the case by the justices may be taken by either party, and may be decided by the Court.

BLACKBURN, J. I am of the same opinion. I think the two points raised before the justice are perfectly untenable. The Vaccination Acts apply to every child under the age of fourteen who has not been vaccinated, and it does not matter whether the child is born within or without a particular district, or before or after the passing of 30 & 31 Vict. c. 84. I also think that the vaccination officer was duly appointed, and that he was justified in taking proceedings without special instructions. I agree with the decision of *Allen* v. *Worthy* (1), and I think that it is competent to justices to make an order toties quoties that the child shall be vaccinated when it has been shewn to their satisfaction that the child has not been vaccinated. After that decision 34 & 35 Vict. c. 98, was passed, which by s. 11 provides that a complaint must be made within twelve months from the time when the matter of complaint arose. Was this complaint made within the proper time? The notice to have the child vaccinated within fourteen days was given to the appellant on the 10th of May, 1872, so that the child ought to have been vaccinated on the 24th of May. The disregard of that notice was the matter of complaint. On the 24th of June, 1873, the present information was laid before the justices, being a period of thirteen months after the notice was disregarded and the time that the subject-matter of the complaint arose. It has been said that the neglect to have the child vaccinated is a continuing offence, and although the notice was disobeyed on the 24th of May it was continually

(1) Law Rep. 5 Q. B. 163.

disobeyed every day the child remained unvaccinated, so that there was a continual cause of complaint, and consequently that an order to vaccinate the child could be made at any time. I do not think we could so hold without upsetting the law with regard to the Statute of Limitations. In cases of neglect to pay a sum of money due, the statute runs from the first day the debt is due, but there is a debt continuing due from day to day; the statute, however, runs from the first day, and not from the day of continuing non-payments. I think in all probability the period of limitation created by s. 11 was inserted in the recent Act in consequence of *Allen* v. *Worthy*. (1) According to that decision, after notice had been given to a parent to vaccinate a child and had been disregarded by him, he might be fined from time to time; the legislature thought that this might be a hardship, and enacted that a fresh notice should be given after twelve months had elapsed; this provision, however, in no way alters the law as laid down in *Allen* v. *Worthy* (1), but only requires that if a notice has been disregarded for a year another notice must be given.

A point was made on behalf of the respondents, that we ought only to regard the questions which are asked the Court, and that we cannot consider points which were not taken before the justices. This is not like a case stated at quarter sessions; on a case stated under s. 6 of 20 & 21 Vict. 43, the judges are to hear and determine the points of law arising on the statement of the case; and this point of law does arise on the statement of the case. In *Purkis* v. *Huxtable* (2), cited on the argument, the point taken on behalf of the appellant was that there was nothing in the case to shew that the innkeeper knowingly permitted persons of bad character to assemble in his house. Had such a point been taken before the justices, evidence that he knew the persons to be bad characters could have been supplied; here a question of law, which no evidence could alter, arises on the statement of facts.

LUSH, J. I think the justice has arrived at a right conclusion on the matters submitted to him. I agree with the decision of *Allen* v. *Worthy*. (1) Had it not been for the statute 34 & 35 Vict. c. 98, passed since that case was decided, the party might have

(1) Law Rep. 5 Q. B. 163. (2) 1 E. & E. 780; 28 L. J. (M.C.) 221.

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been proceeded against toties quoties until the order to vaccinate the child had been obeyed. But by s. 11 of that Act a limitation is put on the proceedings, and a fresh notice will have to be given after the expiration of twelve months from the time the cause of complaint first arose. As to the other question, I think that we can take notice of points of law which arise on the case as stated, although those points have not been taken before the justices.

Judgment for the appellant.

Attorneys for appellant: *Gregory, Roweliffes, & Co., for Leigh & Ellis, Wigan.*

Attorneys for respondent: *Parkers, Pritchard, & Sharpe, for Ackerley & Son, Wigan.*

May 9.

[IN THE EXCHEQUER CHAMBER.]

FISHER AND OTHERS *v.* THE LIVERPOOL MARINE INSURANCE COMPANY.

Marine Insurance—"*Slip*"—*Policy*—30 *Vict. c.* 23, *ss.* 7, 9.

The defendants, a Liverpool insurance company, employed the firm of E. & Co. as their agents in London. The plaintiffs instructed P. & Co. to insure for them steel rails, and P. & Co. prepared a slip, which was initialed by E. & Co. on behalf of the defendants. According to the course of business observed by the defendants' company, P. & Co. sent a copy of the slip to E. & Co., who the same night sent it to the defendants at Liverpool. P. & Co. paid to E. & Co. the premium due on the policy and the amount due for the stamp duty. The steel rails were afterwards totally lost by the perils intended to be insured against, and the defendants then refused to execute any stamped policy :—

Held, affirming the judgment of the Court below, that no action would lie; for that the initialing of the slip and forwarding the copy slip to the defendants were parts of one contract; and that no further contract could be implied to execute a stamped policy within a reasonable time after the copy slip was transmitted to the defendants; and as no stamped policy had been executed, 30 Vict. c. 23, ss. 7 and 9 prevented the plaintiff from maintaining an action.

APPEAL from the decision of the Court of Queen's Bench making absolute a rule to enter a verdict for the defendants. (1)

First count upon a contract that the defendants had warranted that one Eames was their agent in London, authorized to accept

(1) Law Rep. 8 Q. B. 469.

risks and to receive premiums on their behalf, and that the plaintiffs were thereby induced to insure and to pay premiums on the cargo of the ship *Lizzie*, and not to insure elsewhere, and setting out as breach that Eames was not so authorized, and averring loss and damage.

Second count charged a fraudulent misrepresentation by the defendants that Eames was their agent and authorized as in the first count mentioned, whereby the plaintiffs were induced to insure the cargo of the *Lizzie* and pay to the defendants a sum of money for premiums and stamp duty on such insurance, and alleging as breach that Eames was not so authorized, and that no policy was granted, and averring a total loss by perils of the sea.

Pleas. To first count, a traverse of the warranty. To second count, not guilty; and that the defendants did not induce the plaintiffs to insure as alleged.

1. The plaintiffs carry on business as merchants and shipowners at Barrow-in-Furness, and were the owners of the ship *Lizzie*, and continued to be such owners at the time of the loss of the ship. The defendants are a marine insurance company carrying on business at Liverpool under the style of the Liverpool Marine Insurance Company, Limited, and in December, 1871, they entered into a voluntary liquidation.

2. The defendants appointed and employed Eames & Co. to act as their agents in London, to accept risks and receive premiums in London on their behalf, and a circular was issued by the defendants, informing the public of the appointment.

3. Eames was called as a witness by the plaintiffs, and proved the course of business to be as follows:—The firm accepted risks for the defendants by Eames himself initialing the slips. Copies of such were then sent to him by the brokers, and he invariably forwarded copies of the same to the defendants at Liverpool on the same day.

4. The plaintiffs employed their brokers in London, Patton & Co., to insure for them a cargo of steel rails per the ship *Lizzie*.

5. The cargo was the property of the Barrow Hematite Company, as agents for whom the plaintiffs were shipping the cargo, and the *Lizzie* being the plaintiffs' own vessel, they were carrying the cargo upon a charterparty, and took upon themselves the risk of

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the cargo, and to pay the Hematite Company any loss thereon. After the loss, the plaintiffs paid the Hematite Company the amount thereof.

6. On the 16th of November, 1871, the brokers submitted a slip, of which the following is a copy, to Eames, who initialed the same. The parts in italics are in print in the slip :—

4923*l.* 4*s.* 5*d.* "*Cash.*" 16 Nov., 1871.

"*John Patton, Junr., & Co.*

"Lizzey.

"Barrow New York

"Steel Rails f p a

"f g a 880 } 60/ %

"f c & s £6000 }

"£1000 T. R. E. 16/11."

7. The initials T. R. E. appearing opposite the sum of 1000*l.* on the slip, are the initials of Eames, and the slip was put in and proved at the trial, and was not objected to.

8. A copy of the slip or request note was made by the brokers, and sent to Eames, and he the same day forwarded to the defendants a document, of which the following is a copy :—

OPEN.

LIVERPOOL MARINE INSURANCE COMPANY, LIMITED, LONDON AGENCY, LONDON, 16/11/1874. No.

Policy in the name of	On	Voyage including all risks of craft, free of captures and seizures, and the consequences of any attempt thereat.	Sum Insured.	Premium per cent.	£	s.	d.
	Steel rails						
John Patton, junr., & Co.	f p a f g a f C & S	At and from Barrow to New York	£1000	60/			
				Brokerage			
				Discount			
To the debit of	Ship.			Duty . .			
Do.	Lizzy			£			
	Date of Sailing.						

9. On the 1st or 2nd of February, a debit note was forwarded from Eames, to Patton & Company, of which the following is a copy:—

"The Liverpool Marine Insurance Company, Limited, London Agency, Eames & Co., St. Michael's House, Cornhill, E.C.

"To premiums for the month of January, /72,

less brokerage, and 10% discount for cash .	£25	13	0
"Policy duty	0	2	6
"Messrs. J. Patton, Junr., & Co.	£25	15	6

"Note.—The discount will be forfeited in default of prompt payment on the 8th February."

10. On the 29th of January, 1872, the defendants' liquidators in Liverpool wrote a letter to Eames & Co., of which the following is a copy:—

"We have open slips as at foot, and shall be glad to receive instructions regarding them.—J. S. McGhie.

"Nov. 16th, *Lizzie*, Barrow to New York, 1000*l.* on steel rails. J. Patton, Jun., & Co."

11. To this letter Eames & Co. sent no reply, but upon receipt of it communicated with Patton & Co. and received their instructions to put the slip forward. The slip was put forward, but on what date did not appear, except by the correspondence.

12. On the 13th of March, 1872, Patton and Co. paid to Eames & Co., by cheque to the defendants' order, the sum of 25*l.* 15*s.* 6*d.*, being 25*l.* 13*s.* for premium and 2*s.* 6*d.* for stamp duty on the policy, and Eames & Co., acting on their authority, indorsed the cheque for the defendants and paid it into their own banking account, and it was duly paid.

13. The brokers on that occasion, and on several occasions afterwards, applied to Eames for the policy, and were told it had not been sent up from Liverpool, and that he would write a sharp letter about it.

14. The *Lizzie* and cargo were, on the 21st of March, 1872, posted as, and were in fact, totally lost, and the defendants refused to execute any stamped policy or to pay the insurance.

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The following correspondence took place between Eames & Co. and the defendants' liquidators:—Eames to McGhie, 13th of March, 1872: "Patton & Co. have applied to us for policy per *Lizzie*, the slip of which was sent to you some time since. Please send us the policy at your earliest convenience."

Eames to McGhie, 20th of March, 1872. "Copy of yours of 29 Jan. to hand. We have never received the original. The *Lizzie* was sent down to you to put forward some ten days ago, and we have since written asking for policy."

McGhie to Eames, 21st of March, 1872: "As so long a time has elapsed since the insurance per the *Lizzie* was opened, we cannot now issue a policy."

Eames to McGhie, 26th of March, 1872: "Referring to your note in reference to the *Lizzie*, we are surprised at your refusing to issue a policy. This slip was sent to you some time since, and we have written more than once for the policy; and, moreover, Patton & Co. have paid the premium."

McGhie to Eames, 26th of March, 1872: "Will you say when you received the premium for this vessel, as we have no account of it? The earliest request we have for a policy was contained in your letter of the 13 March."

Eames to McGhie, 27th of March, 1872: "The copy of the slip was sent to you some time since; we have no record of the date, because it was sent down without any letter being written (as customary). The cheque was paid 13th March. Patton & Co. inform us that they wish to know by wire to-morrow, without fail, if you intend to issue a policy or not."

McGhie to Eames, 28th of March, 1872. "I have yours of yesterday, and repeat, a policy cannot now be issued. The liquidators do not recognise the payment to you by Patton & Co., as you had no authority to receive it on behalf of this company. Permit me to ask why advice of the payment was not made to the liquidators before?"

Eames to McGhie, 28th of March, 1872. "Never having had our authority to receive money on behalf of the Liverpool Marine cancelled, we of course considered we were justified in applying for and receiving premiums over due; and referring to your other question, it has not been our custom, as you well know, to make

daily advice of payments made to us on behalf of the company. Patton & Co. inform us that they consider you are bound to issue a policy."

16. The company did not at any time return the slip, nor did they in any way intimate that they would not grant a policy until the 21st of March, 1872.

17. The learned judge put the following questions to the jury: 1st. Did the defendants authorize Eames to initial slips, to accept risks, and to receive premiums on their behalf? 2nd. Did the defendants, by approving the circular issued, stating that Eames had authority to accept risks, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe, that if they paid the premium and stamp duty on a slip initialed by Eames, the defendants would issue a policy in accordance with the slip? 3rd. Were the plaintiffs prevented, by the conduct of the defendants, from insuring elsewhere? The jury having answered all these questions in the affirmative, a verdict was thereupon entered for the plaintiffs, with damages 1000*l.*; the declaration to be taken as amended to meet the facts and findings; the judge ruling that there was no evidence on the record as it stood, and reserving leave to the defendants to move to enter a verdict for them, or a nonsuit on the grounds that there was no evidence to go to the jury of liability on the part of the defendants, and that the judge ought not to have allowed the declaration to be amended.

A rule having been obtained accordingly, the majority of the Court of Queen's Bench, Quain and Archibald, JJ., (Blackburn, J., dissenting), made the rule absolute. (1)

Benjamin, Q.C. (*Aspland* with him), for the plaintiffs. It must be admitted that the slip being a contract for marine insurance is void by reason of 30 Vict. c. 23, ss. 7 & 9, and no action can be brought on the slip. The course of business adopted by a private underwriter and that followed by insurance companies is recognised in the judgments of the judges in the court below. In the first case the broker prepares the policy and tenders it to the underwriter for execution, and in the latter the copy slip is sent to the insurance company, who then prepare the policy themselves; on

(1) Law Rep. 8 Q. B. 469.

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receipt of the copy slip a duty devolved on defendants to prepare a policy or to inform the plaintiffs within a reasonable time that they refused to do so; an action will lie for a breach of this duty. The defendants have not performed either of these alternatives, and the plaintiffs have been unable to effect another insurance; they are, therefore, entitled to recover to the extent that they are damnified by the misconduct of the defendants. Secondly, paragraphs 10 and 11 shew, subsequently to the initialing of the slip, that the defendants entered into a fresh contract "to put forward the slip," that is, to prepare and execute a policy; and paragraph 12 shews that the plaintiffs' brokers paid both the premium and the stamp duty; if, therefore, there was no contract on receipt of the copy slip by the defendants, which created a duty to prepare a policy, these paragraphs and the correspondence shew a subsequent contract in February to prepare and execute a policy.

R. G. Williams, Q.C. (*Aspinall, Q.C.*, with him), for the defendants, was not heard.

LORD COLERIDGE, C.J. I am of opinion that the judgment of the Court below must be affirmed, on the short ground, that the initialing of the slip and the sending of that slip by Eames to the defendants, and its receipt by them, and all that ought to have been done in consequence of initialing the slip, constituted one entire and indivisible contract between the plaintiffs and the defendants, the defendants being represented by their agent Eames. If that be so, the contract is one not capable of being enforced; it is a contract made by a slip, and the slip is, as has been laid down in several cases, a contract for marine insurance, and by the express words of 30 Vict. c. 23, such a contract is made absolutely void and incapable of being enforced. Although it is a contract incapable of being enforced in a court of law, I agree that it is a contract binding in honour. The way in which this contract was attempted to be enforced at law was by making what really was one contract into two contracts, by saying that the contract contained in the slip and of which the slip was the evidence was one contract, and that that contract could not be enforced; and that, apart from the contract contained in the slip, there was an obligation on the defendants to prepare a policy and tender it to themselves for exe-

cution, and that such obligation arose impliedly from the state of the facts between the plaintiffs and the defendants; that this contract was enforcible, and that the plaintiffs could recover in this action, not the amount which was covered by the slip, but damages for its non-fulfilment. When a broker, on behalf of an insurance company, initials a slip, he does nothing more than any other person entering into a contract does who is to prepare and execute something as part of the contract he makes; whether it is a policy to be prepared and executed according to the terms of the slip, or a deed to be executed according to the terms of an agreement, it is one and the same transaction. I agree in opinion with the majority of the Court below, that in the present case there was only one contract. It is argued that there was a subsequent contract between the parties; but I think that the whole transaction must be regarded as a performance or non-performance of the original contract entered into when the slip was initialed; it is impossible to distinguish this day or that day as being the date of any fresh or second contract; the whole transaction is one, an entire and indivisible contract; and in my opinion, that one entire and indivisible contract cannot be enforced. The judgment of the Court of Queen's Bench must be affirmed upon the grounds stated in the judgment of the majority of the Court.

BRAMWELL, B. I am of the same opinion. It is said that in this case there are two contracts: one not enforcible by reason of the statute, but the other enforcible. The argument is ingenious, but there is no foundation for it: there are not two contracts. When the practice of insurance companies is borne in mind, the fact that the defendants, or Eames on their behalf, initialed the slip, is nothing more than that the plaintiffs are bound to pay the premium and the stamp upon the policy; and the defendants are bound to receive the premium and to prepare a policy properly stamped, and to pay the loss if there be one. The whole transaction was arranged between the parties at the time of initialing the slip, and there was no necessity for any further arrangement or bargain. The preparation of the policy was part of the original bargain. Nothing afterwards happened which was not in contemplation between the parties when the initialing of the slip took

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place. There is no ground for likening the defendants to the broker in the case of an insurance with a private underwriter: they are not paid for preparing the policy, and they have no duty in reference to the preparation of the policy, except that which they undertook at the time the slip was initialed. If it were not for the 30 Vict. c. 23, which makes the contract void for want of a stamp, no one would say that there were two contracts. If the argument is good for anything, there are many cases in which it could be said that there are two contracts: Take the case of a sale of real property; it is the duty of the vendee to prepare the conveyance. If an action could not be brought on the contract of sale, it could be said an action would lie for not preparing the conveyance. Take also the case of the sale of goods: one of the parties might undertake to put the contract into writing, and afterwards not do so. No action would lie for not selling or delivering the goods, or paying for them, as the case might be; but an action could be brought against him for not preparing an agreement or memorandum in writing. It is obvious that this could not be. There is, I think, only one contract, and the judgment of the Court of Queen's Bench must be affirmed.

BRETT, J. If I had not tried this cause, I should not have added anything. At the trial I was convinced on the evidence that the defendants had entered into an agreement which, though not legally binding, was in every sense binding in honour, and that agreement had been shamefully repudiated; and I confess I sought means by which, if it were possible, without infringing upon the rules of law, to render that repudiation a failure. It is admitted that if this was an ordinary Lloyd's slip, the only undertaking which is to be inferred from the initialing of the slip is an undertaking to execute a policy of insurance. When an underwriter at Lloyds initials a slip, it is clear that he does not undertake to prepare a policy, but to execute a policy when it is tendered to him; and as a slip is a contract having reference to a marine insurance, it is within 30 Vict. c. 23, and void if it be not stamped. It seems to me that the initialing of the slip was the only evidence at the time of any contract for marine insurance made by the defendants; there was no other evidence of any such

contract. But it has been argued that at the time of the initialing of the slip, by reason of the course of business which is carried on by insurance companies, and which is different from the course of business carried on by the underwriters at Lloyds, there was at that time, and by reason of initialing the slip, another and independent contract, namely, that the defendants, besides executing a policy, would prepare a policy, and would procure a stamp for that policy; but if that be a contract made at the same time by reason of that course of business, it only is a contract because the defendants have initialed the slip, and it is therefore a part of the same contract, and, if so, it cannot be enforced any more than the contract to execute a policy: if, by initialing the slip and by the course of business, there is not only a contract on the part of the company to execute the policy, but to prepare the policy and to procure the stamp, it cannot be said there are two contracts evidenced by the same act, but one entire contract. It is said that there is evidence of a subsequent contract that the defendants would get the policy executed. In the first place, there is no evidence that Eames was the agent of the defendants to enter into such a contract; he was merely an agent to bind the defendants by initialing the slips. But this point was never made at the trial, nor was the question left by me to the jury, nor did I reserve leave to enter a verdict on this point, nor does the judgment of my Brother Blackburn proceed on this ground. I think the judgment of the Court below was right, and ought to be affirmed.

CLEASBY, POLLOCK, and AMPHLETT, BB., and DENMAN, J., concurred.

Judgment affirmed.

Attorney for plaintiffs: *J. McDiarmid.*
Attorneys for defendants: *Venn & Son.*

END OF EASTER TERM, 1874.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXVII VICTORIA.

1874
May 23.

HEYWOOD AND OTHERS *v.* PICKERING.

Bill of Exchange—Cheque—Presentment for Payment—Payment by Cheque—Custom of Bankers.

A. in London drew a cheque on B. & Co., bankers at Jersey, in favour of C., on the 27th of January, and C. handed it to a London bank on the 28th, who, having no agent at Jersey, the same day sent the cheque by post direct to B. & Co. demanding payment. The cheque in due course of post would have arrived at Jersey on the 29th. B. & Co. stopped payment on the 4th of February, and on the 7th of February returned the cheque marked "refer to drawer." By the custom of London bankers, when a foreign cheque is paid to a banker by a customer, if the banker has no agent at the place where the cheque is payable, he sends the cheque direct to the banker on whom it is drawn demanding payment, and the banker immediately either remits the money or returns the cheque; cheques drawn on bankers in Jersey are considered foreign cheques:—

Held, that there was a due presentment for payment of the cheque according to the custom of bankers; and that C. had been guilty of no laches so as to make the cheque his own.

DECLARATION for goods sold and delivered.

Plea: Payment before action. Issue thereon.

At the trial before Pigott, B., at the Middlesex sittings during Easter Term, 1873, it was proved that the plaintiffs sold to the defendant 100 gallons of copal oil, and received in payment a cheque of the defendant for 75*l*. The cheque was dated the 27th

of January, 1873, drawn by the defendant on Le Bailly, Deslandes & Co., Jersey Mercantile Union Bank, and was payable to the plaintiffs or their order. The cheque was unstamped, and was drawn in the city of London, but it did not specify the place where it was drawn. The plaintiffs received the cheque at half-past three in the afternoon of the 27th of January, 1873, and the next day paid it to their account at their bankers, the London and Westminster Bank, who, having no agent at Jersey, by that night's post forwarded the cheque to the Jersey bank demanding payment. The cheque in due course of post would arrive at Jersey about the middle of the day on the 29th, and the London and Westminster Bank ought to have received a remittance from the Jersey bank on the 31st at the latest. They received no remittance, but on the 7th of February, the cheque was returned in an envelope without any letter, with the words "refer to drawer" written across it. The Jersey bank stopped payment on the 4th of February; the defendant had sufficient funds at the bank at the time of its stoppage to pay the cheque. By the custom of London bankers, a banker, when a foreign cheque is paid to him by a customer, if he has an agent at the place where the cheque is payable, sends the cheque to the agent to be presented for payment; but if he has no agent at such place, he sends the cheque direct to the banker on whom it is drawn; and the banker on whom the cheque is drawn immediately either remits the money or returns the cheque. Cheques drawn on bankers at Jersey are considered to be foreign cheques.

It was objected, on behalf of the defendant, that there was no proof of a proper presentment of the cheque at the Jersey bank. The learned judge nonsuited the plaintiffs, giving them leave to move to enter a verdict, the Court to draw inferences of facts.

A rule was accordingly obtained to enter a verdict for the plaintiffs for 75*l.* on the ground that the cheque being unstamped was invalid, and not admissible in evidence on the plea of payment (1), and also that the cheque was not taken in satisfaction, and not being paid, the plaintiffs were entitled to recover on the count for goods sold and delivered.

(1) The second ground disposed of the case, and it became unnecessary to decide the first point.

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M'Intyre, Q.C., shewed cause. Assuming the cheque to be in evidence, does the giving of it to the plaintiffs under all the circumstances operate as a satisfaction of the debt? Primâ facie a payment by cheque is a conditional payment, but if the holder of the cheque by his conduct makes the cheque his own, then the payment becomes absolute and the drawer is discharged. The plaintiffs have been guilty of laches in not presenting the cheque at the Jersey bank in proper time. They paid the cheque to their bankers, the London and Westminster Bank, on the 28th of January, who sent it direct to the Jersey bank; they received it on the 29th, and the London and Westminster Bank ought to have received a remittance at latest on the 31st. On not receiving the remittance they ought immediately to have written to the Jersey bank to send a remittance or return the cheque. The cheque was not returned till the 7th of February.

[BLACKBURN, J. We have to draw inferences of fact: We may infer that the London and Westminster Bank wrote to the Jersey Bank on the 31st of January, and the cheque was in consequence returned on the 7th of February.]

The return of the cheque on the 7th of February was too late to enable the plaintiffs to give the defendant notice of dishonour. Assuming that the cheque was duly presented on the 29th of January, it would be too late to give a notice of dishonour on the 7th of February.

[BLACKBURN, J. That point was not made at the trial, and is not reserved.]

W. A. Clark in support of the rule. The plaintiffs received the cheque as conditional payment only; they have been guilty of no laches in presenting the cheque; it was duly presented and dishonoured, and there is, therefore, no discharge of the debt. The plaintiffs received the cheque on the 27th of January; they paid it to their bankers on the 28th, the bankers the same day forwarded it to the Jersey Bank, who received it on the 29th of January; on that day the cheque was duly presented for payment: *Hare* v. *Henty* (1); *Prideaux* v. *Criddle.* (2) The evidence is, that by the custom of bankers, where a London banker has no agent at the place where the cheque is payable, the practice is to send the cheque to the banker on whom it is drawn; presentment by post

(1) 10 C. B. (N.S.) 65; 30 L. J. (C.P.) 302. (2) Law Rep. 4 Q. B. 455.

coupled with this practice is a due presentment of the cheque: *Bailey* v. *Bodenham.* (1) The Jersey Bank were the agents of the drawer, they were not the agents of the plaintiffs. What in effect the plaintiffs did was to ask payment of the person who the defendant says is his agent to pay the money for which the cheque is drawn. If there is any laches on the part of the Jersey Bank in not returning the cheque, it is the laches not of the plaintiffs but of the defendant's agent. The plaintiffs presented the cheque according to the custom of bankers, requesting a remittance—that is due presentment.

BLACKBURN, J. I think that the rule must be made absolute. It is clear law that a payment by cheque is primâ facie only a conditional payment. It does not operate as a payment unless the cheque is paid, or the holder by his conduct makes the cheque his own; it is then equivalent to absolute payment. In the present case the question is, has there been such laches in dealing with the cheque on the part of the plaintiffs as to discharge the defendant? The plaintiffs received the cheque on the 27th of January, there was no undue delay in paying it to their bankers on the 28th; then on that day the bankers followed a course which is usual with London bankers, they sent the cheque to the Jersey Bank by post, and required them to remit the amount to them. If the Jersey Bank had remitted the money all would have been right; they, however did not do so. On the facts and the inferences I draw, I think that there was a due presentment for payment of the cheque on the 29th January; and then, before the bank stopped, there was an actual dishonour of the cheque, so that there was no payment of the cheque. A question was attempted to be raised as to whether there was an obligation on the plaintiffs to give the defendant a notice of the dishonour of the cheque. I only mention it to say that it is unnecessary to decide the point; it was not taken at the trial, and we cannot entertain the question. The only point before us is, was there such a degree of laches on the part of the plaintiffs as made the cheque theirs? I am of opinion that there was no such laches.

QUAIN, J. I am of the same opinion. The law on the subject

(1) 16 C. B. (N.S.) 288; 33 L. J. (C.P.) 253.

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of presentment of cheques for payment is well established by *Alexander* v. *Burchfield* (1); *Robinson* v. *Hawksford* (2); and *Laws* v. *Rand*. (3) It is in those cases laid down generally, that as between drawer and holder the presentment for payment must be within a reasonable time, and that the drawer is not discharged unless some loss is occasioned to him by the delay. The law is also so stated in Byles on Bills, p. 17. In this case the cheque having been received by the plaintiffs on the 27th, is handed by them to their bankers the next day, the 28th, and the bankers on that same day forwarded it by post direct to the drawees. There is ample evidence that, according to the custom of bankers, when a foreign cheque is paid to a banker by a customer, that is the usual mode of transmitting cheques. Is that a good presentment? In *Bailey* v. *Bodenham* (4) Erle, C.J., and Byles, J., thought that sending a cheque by post to a banker might be a good presentment of a cheque; and in *Prideaux* v. *Criddle* (5) Lush, J., was of opinion that a presentment through the post-office was a reasonable mode of presentment. Therefore we have it that, in the present case, there was a due presentment of the cheque according to these authorities. The plaintiffs, therefore, are not guilty of any laches, nor have they done any act to make the cheque their own. It is unnecessary to express any opinion as to whether the plaintiffs ought to have given a notice of dishonour.

ARCHIBALD, J. I am also of the same opinion. The only question is whether the plaintiffs have taken the proper course to have the cheque duly presented. I think they have, and that the cheque was presented in proper course, and that there was no laches on the part of the plaintiffs. There is no question before us as to notice of dishonour.

Rule absolute.

Attorneys for plaintiffs: *Johnson & Weatherall.*
Attorneys for defendant: *Courtenay & Croome.*

(1) 7 M. & G. 1061.
(2) 9 Q. B. 52; 15 L. J. (Q.B.) 377.
(3) 3 C. B. (N.S.) 442; 27 L. J. (C.P.) 76.
(4) 16 C. B. (N.S.) 288; 33 L. J. (C.P.) 253.
(5) Law Rep. 4 Q. B. at p. 461.

DAVIES, APPELLANT; HARVEY, RESPONDENT. 1874

May 27.

Guardian of the Poor—Goods ordered to be given in parochial Relief—Mens Rea.

By s. 77 of 4 & 5 Wm. 4, c. 76, "it shall not be lawful for any person hereafter to be appointed in any parish or union to any office concerned in the administration of the laws for the relief of the poor, or for any person who shall fill any such office, to furnish or supply for his own profit or on his own account any goods, materials, or provisions ordered to be given in parochial relief to any person in such parish or union. . . ."

The appellant was a guardian of the poor for N. Union; he was also a cabinet-maker, and carried on business with D. as D. & Son; an application was made to the board of guardians for clothing and a bedstead for an out-door pauper of the union, and an order made by the guardians for clothing only; the relieving officer purchased from D. at the shop of D. & Son, a bedstead, which was delivered by D. at the house of the out-door pauper; the bedstead was only lent to the pauper by the guardians and remained their property; D. knew, but the appellant did not know, that the bedstead was purchased for the guardians and was to be supplied to the pauper by way of parochial relief:—

Held,—1. That a guardian of the poor of a union is a person appointed to an office within the above section. 2. That the appellant was liable to be convicted under the above section, although he had not knowledge that the bedstead was to be given in parochial relief; and that it was immaterial whether the relieving officer to whom the bedstead was sold was authorized to purchase it. 3. That the bedstead, having been supplied gratuitously in the way of parochial relief, was "given in parochial relief" within the above section.

CASE stated by justices of Glamorganshire, under 20 & 21 Vict. c. 43.

The information charged that the appellant, being one of the guardians of the poor for the parish of Neath, in the Neath Union, and a person concerned in the administration of the laws for the relief of the poor, did furnish or cause to be furnished for his own profit or on his own account goods and materials, to wit, an iron bedstead ordered to be given in parochial relief to a certain poor person in the said union of Neath, contrary to 4 & 5 Wm. 4, c. 76, s. 77.

The following facts were either proved or admitted:—

The appellant had been a guardian of the poor for the Neath Poor-law Union for many years, and was so during the month of July, 1872, when the bedstead was supplied.

Previously to goods being given or otherwise supplied in parochial relief, an application is made to the board of guardians in

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a prescribed form by the relieving officer, and the order is made by the chairman writing down the terms of the order opposite the application in a book called the application and report book, and putting his initials thereto, and an order to the like effect is made in a book kept by the clerk called the relief order book.

On the 23rd of July, 1872, an application was made in the prescribed form for clothing and a bedstead for T. Beasley, a pauper, by the relieving officer, and an order made that clothes be supplied, which order was duly confirmed.

The appellant, in the months of July and August, 1872, and for some years previously thereto carried on business at Neath as a cabinet maker and upholsterer, in partnership with his son, J. F. Davies, under the style of Davies & Son.

On the 24th of July, 1872, the relieving officer purchased at the shop of Davies & Son, from J. F. Davies, an iron bedstead, which was, by the direction of the relieving officer, delivered by J. F. Davies at the house of one T. Beasley, an out-door pauper of the union, but there was no evidence to shew that J. F. Davies or the appellant knew that the order had been given or the application made, nor that either of them knew as a fact that the bedstead was to be given or applied by way of parochial relief.

The appellant was not present when the bedstead was ordered, nor when it was paid for, nor when it was delivered, and the price thereof was paid to J. F. Davies alone, who made out the account for the same in his own name, and gave the receipt in the same manner.

The bedstead was only lent to the pauper, and remained the property of the guardians.

On the part of the appellant it was contended:—That a guardian is not "a person appointed to an office concerned in the administration of the laws for the relief of the poor," inasmuch as guardians are elected by the ratepayers, and not appointed by any individual or corporation, or otherwise, and that therefore s. 77 of 4 & 5 Wm. 4, c. 76, does not apply to guardians, but only to appointed officers, such as clerks to guardians, relieving officers, overseers, masters of workhouses, and so forth. That the appellant did not furnish or supply the goods, the furnishing or supplying by J. F. Davies not being, under the circumstances, a furnishing or supply-

ing by the appellant. That the bedstead was not "goods, materials, or provisions, ordered to be given in parochial relief," for although the application was for clothing and a bedstead, the order was only for clothing, and no order was made for the supply of the bedstead.

That the goods were only lent to the pauper and remained the property of the guardians, and, therefore, they could not be treated in construing a penal statute as having been "given in parochial relief." The justices were of opinion that the evidence given before them brought the case within the operation of the enactment under which the information was laid, and convicted the appellant.

The questions for the opinion of the Court were:—Whether a guardian is "a person appointed to an office," within the purview of s. 77 of 4 & 5 Wm. 4, c. 76. Whether the furnishing or supplying the goods in question by J. F. Davies was, under the circumstances, a furnishing or supplying by the appellant, within the meaning of the section. Whether there was a sufficient order for the goods supplied as "goods, materials, or provisions ordered to be given in parochial relief." Whether, as the goods were only to be lent and to remain the property of the guardians, they were given in parochial relief within the meaning of the statute.

Francis Turner, for the appellant. First, a guardian is not an officer concerned in the admistration of the laws for the relief of the poor within the meaning of s. 77 of 4 & 5 Wm. 4, c. 76. That section only applies to officers who are paid for their services. Guardians are separately dealt with by s. 51, which must be read with 55 Geo. 3, c. 137, s. 6, and those enactments apply to the supply of goods to the workhouse or the poor of the parish generally, and not to supplying goods to an individual pauper, as in the present case: *Proctor* v. *Manwaring* (1); *Henderson* v. *Sherbourne* (2); *Barber* v. *Waite*. (3) Secondly, it must be shewn that the appellant had personal knowledge that the goods had been supplied to the pauper. The whole transaction took place between the appellant's partner and the relieving officer without

(1) 3 B. & A. 145. (2) 2 M. & W. 236.
(3) 1 A. & E. 514.

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the knowledge of the appellant. The case finds that there was no evidence to shew that J. F. Davies, or the appellant, knew as a fact that the bedstead was to be given by way of parochial relief.

[BLACKBURN, J. The questions asked of the Court assume that J. F. Davies had a knowledge that the goods were ordered to be given in parochial relief.]

Thirdly, the order is insufficient. The application was for the supply of clothing and a bedstead, but the order is made only for clothes; there is no order to supply a bedstead.

[BLACKBURN, J. It is immaterial whether there was an order; if the act was de facto done it is within the section. *Greenhow* v. *Parker* (1) is directly in point.]

Fourthly, the bedstead was merely lent to the pauper. There was no offence committed within the section, which prohibits a supply of goods ordered to be given in parochial relief.

Poland, for the respondent. The appellant was rightly convicted. The 55 Geo. 3, c. 137, s. 6, prohibits churchwardens and overseers of the poor, and persons having the management of the poor, from supplying goods for the use of any workhouse; when the 4 & 5 Wm. 4, c. 76, was passed, and new officers for the management of the poor were created, that enactment was, by s. 51, extended to those new officers, such as commissioners, guardians, and other persons appointed under the provisions of that Act. Then s. 77 of 4 & 5 Wm. 4, c. 76, prohibits any person concerned in the administration of the laws for the relief of the poor, whether appointed under 55 Geo. 3, c. 137, or 4 & 5 Wm. 4, c. 76, from supplying goods for their own profit to individual paupers; this was an offence which had not been provided for by the earlier Act; the effect of these statutes now is, that if a guardian were to supply goods for the use of any workhouse or the poor generally, he would be liable to a penalty of 100*l.*, and if he were to supply goods to be given in relief to an individual pauper he would be liable to a penalty of 5*l.* Sects. 51 and 77 create different offences, but a guardian is an officer within both sections. Secondly, if a person who is a guardian is in partnership with another, and the partner, for their mutual profit in the ordinary course of their business, supplies goods to an individual pauper, knowing that it

(1) 6 H. & N. 882; 31 L. J. (Ex.) 4.

is to be given in parochial relief, it is an offence within the mischief of the enactments. The one partner is the agent of the other to supply goods from the common stock, and has authority to carry on the business for their mutual advantage; if a servant instead of a partner had supplied the goods the appellant would have been liable: *Mullins* v. *Collins.* (1) To constitute a crime there must be a mens rea, but this is an offence committed in carrying on a trade, and it is not necessary to prove personal knowledge; it is like the case of a nuisance committed by workmen in carrying on their employer's business without his knowledge; in such a case the employer would be liable to an indictment: *Reg.* v. *Stephens.* (2) In *Nichols* v. *Hall* (3) it was decided that before a person could be convicted of having in his possession diseased cattle without giving notice of the fact to a police constable it must be found that the animals were affected with disease to his knowledge; and in *Hearne* v. *Garton* (4), in order to convict a person of sending vitriol by a public conveyance it must be shewn that the sender had a guilty knowledge; but it is obvious that in those cases knowledge was the gist of the offence. Thirdly, it is immaterial whether there was a sufficient order or not. Fourthly, there was a purchase of the bedstead by the relieving officer, so that the property in it vested in the guardians of the union, and it is lent to the pauper for his use; it is therefore relief to the pauper just as much as if the bedstead had been absolutely given to the pauper, and it is an offence within the meaning of s. 77.

F. Turner, was heard in reply.

BLACKBURN, J. I think the conviction should be affirmed. Notwithstanding the ingenious way in which the statement in the case as to the purchase of the bedstead is framed, we must assume that the justices have found that J. F. Davies, the appellant's partner, knew that the goods were ordered by the relieving officer on behalf of the parish; and he also knew that the goods ordered were to be delivered at the pauper's residence, to be used by the pauper, and that they were ordered to be given to him by way of

(1) Ante, p. 232.
(2) Law Rep. 1 Q. B. 702.
(3) Law Rep. 8 C. P. 322.
(4) 2 E. & E. 66; 28 L. J. (M.C.) 216.

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parochial relief. We are not asked whether there is any evidence to support the conviction; I think, however, there is ample evidence. But we are asked first whether a guardian is a person appointed to an office within the purview of 4 & 5 Wm. 4, c. 76, s. 77. That he is a person appointed to an office concerned in the adminstration of the laws for the relief of the poor seems to me to be beyond all doubt. It has been argued, on behalf of the appellant, that inasmuch as s. 51 of 4 & 5 Wm. 4, c. 76, extends the provisions of 55 Geo. 3, c. 137, s. 6, and expressly mentions guardians, and a guardian is liable under that section to a penalty, he could not possibly be subjected to another penalty under s. 77; and therefore a guardian was not a person within that section; but it is obvious, when we look at the object of the legislation, a guardian is a person within the words of both sections. Sect. 6 of 55 Geo. 3, c. 137, extended to guardians under s. 51 of the later Act, is intended to prohibit the wholesale supply of goods to a workhouse, while s. 77 of 4 & 5 Wm. 4, c. 76, prohibits the supply of goods to one individual pauper. The penalty in the first case being 100*l.*, and in the latter case 5*l.* The second question we are asked is whether the furnishing or supplying of goods by J. F. Davies was a supplying of goods by the defendant. Sect. 77 makes it illegal for a guardian to furnish or supply for his own profit, or on his own account, goods ordered to be given in parochial relief. Now the goods were supplied by the appellant's partner, J. F. Davies, within the scope of the partnership authority for the profit of both partners. If this section made the supplying of goods a crime, I should say it would require something more than that the goods had been supplied under a general authority given to a partner to make the co-partner liable for a crime; but when we look at the object of the section and its language I think it forbids the supplying of goods by a guardian for his own profit and on his own account; whether that be done through the agency of a partner, or a manager, or a servant, the mischief certainly is the same. I agree that, in order to make the supply of goods an offence, it must be shewn that the partner or manager entrusted with authority by the co-partner or master was aware that he was dealing in the supply of goods given in parochial relief. I think it is necessary that knowledge should in that sense

be brought home to a guardian; I do not think it is necessary to show that he had personal knowledge, it is sufficient to constitute the offence if the partner or manager who supplied the goods had knowledge. With regard to the third question; it is immaterial whether the order was sufficient. It is decided by *Greenhow* v. *Parker* (1), and, in my opinion, rightly decided, where a relieving officer does in fact himself supply goods to a pauper and charge the parish, that he is liable to a penalty, whether he has an order or not; and that is good sense. As to the last question, it appears that the pauper was only to have the use of the bedstead, and we must assume that J. F. Davies knew it was purchased for the purpose of enabling the pauper to use it. It would not, however, become the pauper's property, but would be resumed by the parochial authorities when the pauper no longer required it. The question, then, is whether supplying articles to be lent to and used by the pauper by way of parochial relief is within s. 77. I think the enactment is not confined to the case of goods that are to be given, to be parted with altogether, but extends to the case of supplying goods to a pauper which the pauper was to have in consequence of relief being ordered him, goods which he was to have gratuitously. Our judgment must therefore be for the respondent.

LUSH, J. I am of the same opinion. With regard to the latter part of the case I think the facts bring it precisely within the words of the section. The relieving officer ordered at the shop of the appellant and his partner an iron bedstead to be sent to the pauper, and it was supplied by the partner and sent to the pauper's house, he knowing at the time that it was sent in pursuance of an order for parochial relief. The word "given" cannot be construed in s. 77, in its strict literal sense, it must be construed as being supplied gratuitously, whether as an absolute gift or not in the way of parochial relief. I think the case comes within the very words of the enactment. The material question, no doubt, is whether the appellant is liable, he not personally knowing at the time of the supplying of this bedstead, that it was to be given in parochial relief. From the words of the enactment I am of opinion that he is a person within the very scope and object of s. 77.

(1) 6 H. & N. 882; 31 L. J. (Ex.) 4.

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The section does not make the supplying of goods a crime, but prohibits it by a penalty; the intention is to prevent persons who hold offices concerned in the administration of the laws for the relief of the poor dealing for profit with the parish. The bedstead was supplied with the knowledge of the appellant's partner, under a general authority given by the appellant, for the benefit of the appellant and the partner, and it was supplied by way of parochial relief. The goods are supplied in that sense by the appellant, though actually supplied by his partner; he shares the profit, and it is supplied on his account; I think it is strictly within the words as well as the obvious intention of the enactment. Were it otherwise, it would make a very wide way for evasions of this very salutary enactment.

Judgment for the respondent.

Attorneys for appellant: *Cowdell, Grundy, & Browne.*
Attorney for respondent: *Peacopp.*

June 3.

EASTWOOD, APPELLANT; MILLER, RESPONDENT.

Gaming—Betting Houses Act (16 & 17 *Vict. c.* 119), *s.* 3—"*Place*"—*Pigeon-shooting Match.*

The appellant was the occupier of certain inclosed grounds, in which a pigeon-shooting match between two persons for 10*l.* a side, and afterwards a foot-race, took place, and into which the public were admitted on payment of money. The persons who were admitted into the grounds made bets with each other both on the pigeon-shooting match and on the foot-race:—

Held, that the grounds were a "place," and that they were kept and used by the appellant for the purpose of betting within the meaning of the Betting Houses Act (16 & 17 Vict. c. 119), s. 3.

Case stated by justices for the borough of Dewsbury, in the West Riding of Yorkshire, under 20 & 21 Vict. c. 43.

The appellant was charged on an information that he did unlawfully use a certain place, to wit, a field, for the purpose of betting on a certain pigeon-shooting match for money, contrary to 16 & 17 Vict. c. 119, s. 3. (1)

(1) 16 & 17 Vict. c. 119, s. 1. "No house, office, room, or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed

At the hearing the following facts were proved. On Saturday, the 15th of November, 1873, G. F. Whittet, police constable, and two other officers, went to the borough park ground, occupied by the appellant. On arriving at a gate at the entrance, a man stopped him, and asked him for a ticket. Whittet told the man at the gate that he was a policeman, and did not require one. He saw other people pay money and receive a ticket, who were then admitted into the grounds. He and the other officers were also admitted into the grounds, which are inclosed and contain an area of 3*a*. 3*r*. 25*p*. He there saw a number of people, and amongst them two bookmakers with books in their hands. These two men were shouting out, "Twenty to two on the match." The match about to take place was a pigeon-shooting match for 10*l*. a side between a person of the name of Parkinson and a person of the name of Wooler. Two men came alongside Whittet and up to one of the bookmakers, and one of them gave to one of the men with a book a sovereign. As this man was getting some change back, the other man said, "Hold on, that will do for both of us." The bookmaker took a ticket out of his book and gave it

by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto: or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as and for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay, or give thereafter any money or valuable thing on any event or contingency of, or relating to, any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid. . ."

Sect. 3. "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned or either of them, or any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly or wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of them, and any person having the care or management of, or in manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty not exceeding one hundred pounds, as shall be adjudged by such justices. . ."

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to one of the men, and said, "That's on Wooler." Soon after this, Wooler was going to shoot at a pigeon, when a man shouted out, "Four to one he kills." This bet was taken, and the man said, "Three to one he kills." Persons were shouting all over the grounds. Appellant was standing near to Whittet, and could hear what the bookmakers and other persons said, but did not take any part or say anything. After the pigeon match a foot-race took place, at which bets were made as before on the pigeon-shooting match.

It was contended on behalf of the appellant, first, that the ground was not used or permitted to be used by the appellant for betting. Secondly, that the ground was not a "place" within the meaning of the Act. The case of *Doggett* v. *Catterns* (1) was quoted, in which the appellant was in the habit of going beneath a tree in Hyde Park, and there receiving bets from persons on horse-races.

The justices were of opinion that the appellant was the sole occupier of the inclosed ground, and received money for admission; that it was a "place" within the meaning of the Act; and that the appellant knowingly used, or permitted the same ground to be used, for the purpose of betting, and convicted the appellant.

The question for the opinion of the Court was, whether the ground was used or permitted to be used by the appellant for the purposes of betting, and whether the ground was a "place" within the meaning of the Act.

Forbes, for the appellant, argued that the conviction could not be supported on the authority of *Doggett* v. *Catterns* (1); *Clark* v. *Hague* (2); *Morley* v. *Greenhalgh* (3); *Coyne* v. *Brady*. (4)

The respondent did not appear.

LUSH, J. The question in this case is, whether there is evidence to justify the magistrates in coming to the conclusion that the defendant used or permitted to be used the premises described for the purpose of betting, and that question resolves itself into two.

(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

(2) 2 E. & E. 281; 29 L. J. (M.C.) 105.

(3) 3 B. & S. 374; 32 L. J. (M.C.) 93.

(4) 12 Ir. C. L. 577.

The magistrates, first of all, ask us to say whether the ground as described was a "place" within the meaning of the Act of Parliament; and, secondly, if it was a "place," whether upon this evidence the defendant used or permitted it to be used for the purpose of betting. [The learned judge then read the statement in the case.]

Now the question is, whether these facts justified the magistrates in coming to the conclusion that these inclosed grounds were a place within s. 3 of 16 & 17 Vict. c. 119; and, secondly, whether the appellant used or permitted that place to be used for the purpose of betting.

I am of opinion that there was evidence to justify the magistrates in coming to the conclusion that this was a "place" within the meaning of the Act; and, secondly, that the defendant used and permitted the place to be used for the purpose of betting, in violation of the Act.

First, was it a "place?" It could hardly be contended that grounds uncovered cannot be a "place" within the meaning of the Act. I see no reason whatever, from the framing of the Act, to hold that there cannot be a "place" within the meaning of the Act unless it is a structure of some kind—a building or a tent. An inclosed area, though uncovered, might as well be a "place" within the Act as a place either covered with canvas, as a tent, or a light structure, as a building. It is an inclosed place, occupied exclusively by the appellant, and is therefore within the language and the intent of the Act. The fact that it is a large inclosure cannot affect the question. Whether it is a quarter, a half acre, or three acres cannot affect the question, if it is a "place" occupied and inclosed within the meaning of the Act, to which persons were admitted by the sufferance of the occupier.

Now, the cases which have been cited in no way limit the construction of the Act, or the construction I have thought it right to put upon it. In *Doggett* v. *Catterns* (1) a person was convicted of having kept a betting table under one of the trees in Hyde Park. It could not be said that that was a place used for the purpose of betting; the person there was not an occupier of the place, and he had no business to use it for that purpose. The same may be said

(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

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of the cases of *Clark* v. *Hague* (1) and *Morley* v. *Greenhalgh.* (2) The persons resorted, in the last case, to a quarry for the purpose of witnessing a cock-fight, and it was held, on the authority of *Clark* v. *Hague* (1), that the quarry was not a place kept or used by the occupier of the quarry for the purpose of cock-fighting. He had nothing to do with the men being there, and they had no business there. The Act is not directed against persons assisting at a cock-fight, but only against those who keep and allow a place to be used for the purpose of cock-fighting. The same observation applies to the case of *Clark* v. *Hague.* (1) But in the case before us, what was done was done with the consent of the appellant, who was the sole occupier of the inclosed ground. It was he who allowed persons to come there on paying for a ticket. He was, as I have said, the sole occupier of the premises, and he was the person who permitted that place to be used for the purpose for which it was used.

The other question is, whether there was evidence that "the place" was kept and used for the purpose of betting? It is objected that it was only shewn that on one occasion this was done; and, moreover, it was objected, that the primary object of keeping the place was not for the purpose of betting, but for the purpose of pigeon-shooting, and that in construing the Act we must regard the primary object for which the place was kept or used, and not that which appears to have been only incidental. It was argued that the betting was only incidental to the pigeon-shooting. I cannot take this view of the evidence. I think there was enough to justify the magistrates in coming to the conclusion that the owner of these premises did permit them to be used for the purpose of betting as well as for the purpose of pigeon-shooting; and that there was very good reason to guide the magistrates to the conclusion that it was kept for both purposes, for the appellant perfectly well knew that allowing it to be used for pigeon-shooting would also introduce a number of persons who would bet upon the matches, and he kept it, therefore, for that as well as the other, and the two purposes were combined; the magistrates, therefore, might well come to the conclusion that the appellant did wilfully

(1) 2 E. & E. 281; 29 L. J. (M.C.) 105.

(2) 3 B. & S. 374; 32 L. J. (M.C.) 93.

and knowingly permit the place to be used by persons for the purposes of betting. I ought to add that *Coyne* v. *Brady* (1) is similar to *Doggett* v. *Catterns*. (2) There the person resorted to a place where he had no business to go, and where he had no permission to go, and therefore that case does not govern the present.

I think, therefore, the magistrates were right in coming to the conclusion they did, and in convicting the appellant.

ARCHIBALD, J. I am of the same opinion. There are two questions: first, whether this is a "place" within the meaning of 16 & 17 Vict. c. 119; and, secondly, whether there is evidence that it was permitted to be used for the purpose of betting.

I think we should fall very far short in carrying out the object of this Act, if we were to hold that it was necessary that there should be a room, or house, or office, or erection of some kind, in order to its being a "place" within the meaning of the Act. There may be a "place," although it is open to the air; there may may be a "place" without any kind of erection; and of course it must depend upon the circumstances of each particular case whether it is brought within the description of "place." Upon the facts as they appear here, the magistrates were justified in holding that this was a "place." The area is of three or four acres in extent. The "place" is one inclosed, having a gateway. Persons were admitted by ticket, and on payment of a price for entrance. The appellant is the occupier of this inclosed land, and received money from the persons for admission into it. I think that, under those circumstances, it cannot be doubted that this was a "place" within the meaning of the Act. It differs entirely from *Doggett* v. *Catterns* (2) and *Coyne* v. *Brady*. (1) In the first case, the "place" was a spot under a tree in Hyde Park, to which the person had no right to resort, and in the other case the facts were very much the same.

Then arises the other question: was this a place permitted by the occupier or owner knowingly and wilfully to be used for the purpose of betting? It is argued that the grounds were used for pigeon-shooting and foot-races, and that the betting was merely

(1) 12 Ir. C. L. 577. (2) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

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incidental to that purpose, and that therefore it was not used for the purpose of betting. It seems to me that that contention cannot be maintained, and although persons may resort to it for the purpose of witnessing the shooting matches and running matches, if they are allowed to bet there, it is impossible to say the place is not used for betting. I think that the evidence before the magistrates justified them in finding that this was a place used for the purpose of betting. I think, on these grounds, it is brought within the operation of s. 3, and that the cases cited in the argument have no bearing upon the present case; because in those cases the use of the place was not by the permission of the occupier, or by the permission of any person having authority to give permission to use it, but by some person who took upon himself to go there when he had no permission and no business to be there for such a purpose. Here the person who gave permission was the occupier of the premises in question. I think that makes a difference, and that the conviction was right.

Judgment for the respondent.

Attorneys for appellant: *Blakeley & Berwick, for Ibberson, Dewsbury.*

June 5.

SMIDT *v.* TIDEN AND ANOTHER.

Ship and Shipping—Charterparty—Implied Contract to pay Freight.

A charterparty was entered into in London on the 17th of June, 1872, between plaintiff, as master of a ship lying at London, and R. B. L., a shipbroker, to carry 407 tons of iron from H. to G., at freight of 7*s.* 3*d.* per ton. Freight to be paid in London on signing bills of lading, the owner or master to have an absolute lien for freight. On the following day L. chartered the ship to the defendant at 8*s.* per ton for the same amount of iron. The charter contained similar clauses as to freight and lien, and the following clause at the end: "The brokerage of 5 per cent. is due on the execution of this charter to R. B. L., by whom the vessel is to be entered and cleared at the port of loading." Though the defendant thought he was treating with L. as broker for the ship, L. had no authority in fact to act as broker for the plaintiff, or to receive the freight; and neither plaintiff nor defendant knew of the charter entered into by the other. The cargo having been put on board by defendant, the master signed bills of lading making it deliverable to consignees or assigns, "they paying freight for the said goods as per charterparty." The plaintiff did not demand the freight on

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signing the bills of lading. The cargo was duly delivered at the port of discharge; and in the mean time L. obtained payment of the freight of 8*s.* per ton from defendant, and afterwards stopped payment, leaving the 7*s.* 3*d.* per ton unpaid to plaintiff. The plaintiff having sued defendant for the 7*s.* 3*d.* per ton for the carriage of the iron:—

Held, that the plaintiff could not recover: for that the plaintiff and defendant never were ad idem, and consequently there was no express contract between them; and that, under the circumstances, no contract to pay reasonable freight for the carriage could be implied on the shipment of the goods.

CASE stated by consent without pleadings.

The facts are fully stated in the judgment of the Court.

May 29. *Cohen, Q.C.* (with him *Hollams*), for the plaintiff. Although the defendants were deceived by Lyth, and were led by him to think he was the broker of the ship, and although, therefore, there may be no express contract between the plaintiff and defendants, still a contract to pay a reasonable freight for the carriage arose on the mere shipment of the goods: *Domett* v. *Beckford.* (1)

[ARCHIBALD, J. There there was no charterparty.]

Sandeman v. *Scurr* (2) shews that the defendants, having delivered their goods to be carried in ignorance of the charter, get a right of action by the bill of lading against the shipowner as to the safe carriage of the goods; and the converse must hold, that the shipowner can maintain an action for freight.

R. G. Williams, Q.C. (*Lanyon* with him), for the defendants. Through the fraud of Lyth the plaintiff and defendants were kept in ignorance of the others' charterparty, so that they never were ad idem, and consequently no express contract was ever made between them; nor can any contract be implied under the circumstances. *Sandeman* v. *Scurr* (2) is distinguishable. Here the plaintiff knows of the charter, and therefore the master signs as agent of the charterer, and not as agent of the owner.

[LUSH, J. Not exactly as agent of the charterer, but because he is bound to sign by reason of the charterparty.]

Then the plaintiff signed under the charter to Lyth, and not

(1) 5 B. & Ad. 521. (2) Law Rep. 2 Q. B. 86.

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under the charter to the defendants. So that, in any view, the plaintiff and defendants never were ad idem.

[As the judgment of the Court turned upon this point, it is unnecessary to give the arguments further. The following cases were referred to: *Major* v. *White* (1); *Newberry* v. *Colvin* (2); *Marquand* v. *Banner* (3); *Gilkison* v. *Middleton* (4); *How* v. *Kirchner* (5); *Kirchner* v. *Venus* (6); *The Teutonia* (7); *Mercantile Bank* v. *Gladstone* (8); *Raffles* v. *Wichellhaus* (9); *Peek* v. *Larsen.* (10)]

Cohen, Q.C., in reply, cited *Michenson* v. *Begbie.* (11)

Cur. adv. vult.

June 5. The judgment of the Court (Mellor, Lush, and Archibald, JJ.), was delivered by

LUSH, J. This is an action to recover freight for the carriage of railway iron from Hartlepool to Gothenburg, under the following circumstances:

On the 17th of June, 1871, a charterparty was entered into in London between the plaintiff, as the master of the ship *Gothenburg*, then lying in the port of London, and one R. B. Lyth, a shipbroker, whereby the plaintiff engaged to proceed forthwith to Hartlepool and there take on board 407 tons of railway iron, and carry the same to Gothenburg, on being paid freight at the rate of 7*s.* 3*d.* per ton. The freight to be paid in London on signing bills of lading. The owner and master to have an absolute lien for all freight, dead freight, demurrage, and all other charges. The master to sign bills of lading as presented without prejudice to the charter.

Having obtained this charter, Lyth, on the following day, the 18th of June, chartered the *Gothenburg* to the defendants to carry the same quantity of railway iron from Hartlepool to Gothenburg

(1) 7 C. & P. 41.
(2) 1 Cl. & F. 283, 297.
(3) 6 E. & B. 232; 25 L. J. (Q. B.) 313.
(4) 2 C. B. (N.S.) 134; 26 L. J. (C. P.) 209.
(5) 11 Moo. P. C. 21.
(6) 12 Moo. P. C. 361.
(7) Law Rep. 4 P. C. 171.
(8) Law Rep. 3 Ex. 233.
(9) 2 H. & C. 906; 33 L. J. (Ex.) 160.
(10) Law Rep. 12 Eq. 378.
(11) 6 Bing. 190.

at 8*s.* per ton; freight to be paid in London, less insurance, on signing bills of lading. This charter contained a similar clause of lien for freight, dead freight, and demurrage, and a clause in the following terms: "The brokerage of 5 per cent. is due on the execution of this charter to R. B. Lyth, by whom (or his agents) the vessel is to be entered and cleared at the port of loading."

It was argued, and with reason, from this latter clause, that the defendants knew they were treating with a broker, and not with the owner; but it was found as a fact that Lyth had no authority to act as broker for the plaintiff, to effect the charter, or to receive the freight. (1)

Neither the plaintiff nor the defendants had any notice or knowledge of the charter entered into by the other of them until after delivery of the cargo. The master knew nothing of the charterparty between Lyth and the defendants; the defendants knew nothing of the charterparty between the master and Lyth.

The vessel proceeded to Hartlepool, and there took in from the defendants the 407 tons of railway iron. Having shipped the cargo, the defendants presented a bill of lading making the cargo deliverable to "order or assigns, he or they paying freight for the said goods as per charterparty," which the master signed and gave out, without requiring payment of the freight. At the port of discharge the iron was delivered on the 25th of August to the order of defendants without the lien being insisted on. Meanwhile, on the 2nd of August Lyth obtained payment of the freight of 8*s.* per ton from the defendants, pursuant to his charter of the 18th of June, and shortly afterwards stopped payment, leaving the freight of 7*s.* 3*d.* per ton unpaid.

It thus appears that each of the parties to the action acted under a mistake. The master supposed that the bill of lading which he signed referred to his charterparty with Lyth; the defendants, on the other hand, supposed that it referred to the charterparty which they had made with Lyth. Each of them was ignorant of what was in the mind of the other; each acted in

(1) It was also found as a fact that defendants did not know that Lyth had no authority.

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good faith; and neither of them did anything calculated to or which did in any way mislead the other. Under these circumstances, the bill of lading being ambiguous and equally capable of being applied to the one charterparty as to the other, we cannot hold it to be a contract or evidence of a contract between the parties. It does not express that which was common to both minds, and, therefore, it is not binding upon the parties.

But it was contended that, putting aside the bill of lading, the mere shipment of the goods raised an implied contract by the shipper to pay a reasonable freight to the master for the carriage. Under certain circumstances this may be so, but no such implication can exist in the present case. The diversity of mind and purpose, which vitiates the bill of lading, and prevents that from being evidence of the contract, existed at the time of the shipment. The goods were put on board in the supposed fulfilment of one charterparty by which the shipper was to pay 8*s.* per ton to Lyth, and they were accepted in supposed fulfilment of another, by which Lyth was to pay 7*s.* 3*d.* per ton to the master. At no stage of the transaction were the parties ad idem. It follows that there was no contract, express or implied, upon which the plaintiff can recover against the defendants. Had he insisted on payment on signing the bill of lading, as he might have done; or had he enforced his lien at the port of delivery, he might have protected himself from loss. Not having done so, he has no means of obtaining payment from the defendants.

We, therefore, give judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Hollams, Son, & Coward.*
Attorney for defendants: *H. P. Sharp.*

DE WOLF *v.* THE ARCHANGEL MARITIME BANK AND INSURANCE COMPANY (LIMITED). 1874 *June* 8.

Marine Insurance—Words "at and from" a Port—Implication that there should be no unreasonable Delay in Ship reaching Port.

In a voyage policy of insurance "at and from" a port, it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such time, the policy does not attach.

DECLARATION on a policy of insurance, dated the 12th of July, 1872, upon chartered freight in a ship called the *Florence Chapman*, at and from Montreal to Monte Video.

Plea (amongst others), that at the time of making the policy the ship was not, nor did the ship within a reasonable time thereafter arrive, at Montreal, and great and unreasonable delay occurred before the ship arrived at Montreal, being a delay which was material to the risk of the policy, and by reason thereof the policy at the commencement of the risk had not attached.

Issue joined.

At the trial, in the Mayor's Court, before the Common Serjeant, a verdict was found for the defendants with leave to the plaintiff to move.

A rule was afterwards obtained by the plaintiff for a new trial, on the ground that the Common Serjeant misdirected the jury, first, in not leaving to them the question whether the delay in commencing the risk was justified by necessity; secondly, in directing them that the only question was whether such delay altered the risk.

April 30. *C. Bowen* shewed cause.

Benjamin, Q. C., and *Aspland* supported the rule.

The facts, the course at the trial, and the arguments sufficiently appear in the judgment of the Court.

In addition to the authorities referred to in the judgment, the following were cited: *Small* v. *Gibson* (1), *Beckwith* v. *Syde-*

(1) 16 Q. B. at p. 156.

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DE WOLF v. ARCHANGEL INSURANCE CO.

botham (1), *Grant* v. *King* (2), *Phillips* v. *Irving* (3), *Jones* v. *Neptune Marine Insurance Co.* (4)

[BLACKBURN, J., referred to *Jackson* v. *Union Marine Insurance Co.* (5)]

Cur. adv. vult.

June 8. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.,) was delivered by

BLACKBURN, J. This was an action tried in the Mayor's Court, before the Common Serjeant.

The action was on a voyage policy on ship "at and from Montreal to Monte Video."

The 4th plea, on which alone the question before us arises, was, that the ship was not at Montreal within a reasonable time, being a delay materially varying the risk. The facts as to this were, that the policy was effected on the 13th of July at a premium of 2 per cent. No question was asked by the underwriter as to where the ship then was, and no information was offered by the assured; but in fact she was then at sea on a voyage intended to end at Montreal. She did not arrive at Montreal till the 30th of August. Evidence was given that the delay in the arrival at Montreal changed the voyage from a summer one to a winter one, which materially affected the risk and the rate of premium.

Evidence was offered on the part of the plaintiff, that the delay in arriving at Montreal was not voluntary on his part, but was occasioned by perils of the seas on the voyage out to Montreal.

The Common Serjeant rejected this evidence, giving leave to the plaintiff to move in this court for a new trial on this ground.

The case was then left to the jury, who found that the delay was unreasonable, and that the risk was thereby materially changed.

A rule nisi was obtained for a new trial, which was argued in last term before my Lord, my Brother Lush, and myself, when the Court took time to consider.

As the evidence was rejected, we must consider the case as if it had been received and had established what it was offered to

(1) 1 Camp. 116.
(2) 4 Esp. 175.
(3) 7 M. & G. 325.
(4) Law Rep. 7 Q. B. 702.
(5) Law Rep. 8 C. P. 572.

prove, and as if the jury had found not only, as they have done, that there was unreasonable delay between the making of the policy and the commencement of the risk intended to be insured against, materially altering that risk, but also that the delay was occasioned by matters beyond the control of the assured. And then we have to determine whether that would be a defence or not.

Nothing would seem easier than for the parties making a policy to insert a few words preventing all possibility of dispute on such a point. If the insurance had been in this case "at 5 per cent., to return 3 per cent. if the ship was at Montreal on or before some named day, there would have been no question but that the underwriters would, in this case, have been liable, and the assured would not have had to pay the winter premium unless the underwriter ran the winter risk. If the underwriters had inserted "warranted to be at Montreal on or before" some named day, there can be no doubt that the risk would not have attached; and in either case, by naming a fixed day, the controversy as to when the risk became varied would be avoided. But we are informed that in practice there are great if not insuperable difficulties in the way of introducing unusual clauses into policies, and that brokers prefer the risk of causing litigation at the expense of their customers to the risk of frightening away custom by proposing something unusual. We must anticipate that policies will continue to be made as this has been; and the question before us is therefore one of considerable importance.

It is quite clear that the words "at and from a particular place," do not import either a warranty or a representation that the vessel at the time of making the policy is already at the place. In *Hull* v. *Cooper* (1), decided in 1811, the case was one of an insurance on goods "at and from Heligoland to a port in the Baltic." At the time when the policy was effected, the 13th of August, the ship was in the Thames, which fact was known to the assured and not communicated. She did not sail from the Thames till the 27th of August, a fortnight later, which latter fact could not have been known to the assured at the time of making the policy, as it had not then happened. The plaintiff having obtained a verdict, a

(1) 14 East, 479.

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motion for a new trial was refused. It appears from the report as if the counsel who moved treated the case entirely as one of concealment and not as one of a change of risk; but Lord Ellenborough, in his judgment, separates the two questions. He says: "When a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time or shortly will be there; for if she is only to be there at a distant period that might materially increase the risk. But it has never been understood that the terms of such a policy necessarily imported that the ship was at the place at the very time so as to make the assured guilty of deception if she were not." So far he is dealing with the non-disclosure of the fact that the ship was in the Thames on the 13th of August. He then proceeds: "It was a question for the jury, whether the intervening period materially varied the risk in this instance; the interval being from the 13th to the 27th of August, with the additional days which elapsed from the sailing till she reached Heligoland. And the jury were not persuaded that the risk was thereby varied, and found for the plaintiff." And Bayley, J., says, "It was a question for the jury whether the delay in reaching Heligoland for so many days after the policy was effected, materially varied the risk." The affirmative decision here is, that a delay not varying the risk does not discharge the underwriter, but the opinion is expressed that a delay materially varying the risk does discharge the underwriter, though that was not the very point decided.

In *Driscol* v. *Passmore* (1), decided in 1798, where an analogous question arose and the plaintiff recovered, it is stated in the report, that "it was in evidence that the difference of season arising from this delay did not vary the risk." *Brine* v. *Featherstone* (2) came before the Court on a rule to enter the verdict on a point reserved at the trial, and the Court in banc had not to consider whether the delay was such as to discharge the underwriters. The facts as stated in the report appear to be such as would have afforded evidence that the delay was such as to vary the risk; but if that defence was raised at nisi prius, which does not appear to have been the case, there may have been some other evidence not stated in the report which justified the finding of the

(1) 1 B. & P. 200. (2) 4 Taunt. 869.

jury. Neither of those cases can, as we think, be considered in conflict with *Hull* v. *Cooper*. (1)

The case, however, that comes nearest to the present is that of *Mount* v. *Larkins*. (2) In that case the facts were found in a special verdict, a part of which only is set forth in the report. The policy was on the ship *Aquila*, at and from Singapore and Batavia, both or either, to the ship's port of discharge in Europe. In the report it is said that it was found that the policy was entered into on the 28th of February, 1824; that the ship sailed from England in the beginning of September, 1823, on a voyage to the Cape of Good Hope, Van Dieman's Land, and Sydney, and thence to Singapore. It is not stated in the report that it was known to the underwriters that she was bound on this preliminary voyage, but it is scarcely possible that it should be otherwise, and in the judgment of the Court it is assumed throughout that it was known to them. The jury found that there was "unreasonable and unjustifiable delay between the making of the policy of assurance and the commencement of the risk intended to be insured against." On this the Court of Common Pleas decided in favour of the defendants, saying "We must intend that the risk was in fact varied, and consequently the underwriters discharged." This would be precisely in point, were it not that it was there expressly found that the delay was unjustifiable, and that in the present case the plaintiff has not been allowed to give evidence to shew that the delay was not from any fault of his. The ground on which the judgment delivered by Tindal, C.J., in *Mount* v. *Larkins* (3) is based is that "The underwriter has as much right to calculate upon the outward voyage on which the ship is then engaged being performed in a reasonable time and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as to the underwriter, who has another risk substituted instead of that which he has insured against, and in both cases the alteration is occasioned *by the wrongful act of the insured himself*." This may be relied on as an expression of opinion that the delay, if *necessary*, would not discharge the underwriters. It may be so, where the fact that

(1) 14 East, 479. (2) 8 Bing. 108. (3) 8 Bing. at p. 122.

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the vessel is on a preliminary voyage is known and communicated to the underwriter, so as to make that the basis of the contract; and it seems to have been understood by Tindal, C.J., that the principle on which the cases of *Vallance* v. *Dewar* (1) and *Ougier* v. *Jennings* (2) were decided was on the ground of notice. He says in both those cases, "It is admitted that a delay in the commencement of the risk, by the interposition of an intermediate voyage not communicated to the underwriters, would discharge the policy, unless such intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters."

We need not in the present case decide how that is, for there was no communication made to the underwriters as to where the ship was at the time when the policy was made. And we think it, under such circumstances, not material whether the delay which varies the risk was occasioned by the fault or the misfortune of the assured. In either case the risk is equally varied.

Where the alteration in the course of the voyage after the risk has attached is justified by necessity it does not vary the risk. The underwriter has undertaken to insure the vessel during the usual and proper course of the adventure. Now, though, under ordinary circumstances, the usual proper course of a voyage is to proceed direct, or if chased by a hostile cruiser, or forced to run before a storm, to go out of the direct course, the underwriter takes his chance of the vessel being forced to do so. But the underwriter does not take upon himself any part of the risk of the vessel being delayed so long as to vary the risks by perils of the sea or otherwise on its passage to the port where the risk is to attach. This seems involved in the decision of *Hull* v. *Cooper* (3), that the assured is not bound to communicate to the underwriter the place where the vessel is at the time of insurance. For if the time when the risk is to attach might be indefinitely delayed by perils affecting the passage from the place where the vessel was, it must be material to the underwriter to know what that place is. If, on the other hand, at whatever place the ship then is, the risk

(1) 1 Camp. 503. (2) 1 Camp. 505, n. (3) 14 East, 479.

is not to attach unless the vessel in fact arrives at the port within a proper time, it is not material to the underwriter at what place the ship then is.

The position is laid down in Phillips on Insurance, vol. i. p. 379, s. 690, "that it is an implied understanding that the risk is to commence within a reasonable time, unless the policy contains some express provision on the subject." He elsewhere, vol. i. p. 332, s. 602, expresses a hesitating opinion that a representation, though not embodied in the policy, may have the effect of qualifying or rebutting an understanding that is only implied. As already said, we are not called upon to decide how this may be, as in the present case there was neither representation nor express provision in the policy. We think, at all events, in the absence of a representation, that in a policy "at and from a port" it is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied, otherwise the risk does not attach.

The rule, therefore, must be discharged.

Rule discharged.

Attorneys for plaintiff: *Flux & Co.*
Attorneys for defendant: *Ashley & Tee.*

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June 5.

Port Dues—"Coals exported from the Port," Meaning of—35 Vict. c. xiii.

By the Tyne Coal Dues Act, 1872 (35 Vict. c. xiii.), the old coal dues are abolished, and the commissioners are empowered to levy dues, inter alia, one penny per ton on "coals exported from the port":—

Held, that, in the absence of anything in the Act to the contrary, "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port;" and therefore included coals taken out of the port in a steamer to be consumed on board during a distant voyage.

CASE on appeal from the County Court of Northumberland, holden at Newcastle-on-Tyne.

The following are the material parts of the case:—

The action was brought to recover 2*l.* 4*s.* 2*d.*, the amount of

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coal dues claimed by defendant, and paid by plaintiff under protest, under the following circumstances :—

In 1872 the Tyne Coal Dues Act, 1872 (35 Vict. c. xiii.), was passed; it is entitled "An Act to abolish the Tyne Coal Dues, and in lieu thereof to provide new dues to extinguish the right to increase rates under The Harbours and Passing Tolls Act, 1861, &c."

After reciting the previous Acts, 13 & 14 Vict. c. lxiii., and 33 & 34 Vict. c. xc., and that it is expedient that the said dues called the coal dues should be abolished, and that in lieu thereof and in extinction of the right, power, and claim of the commissioners under s. 14 of The Harbours and Passing Tolls, &c., Act, 1861, to indemnify themselves for the loss of the compensation for differential dues, there should be payable to the commissioners tonnage dues on coals, cinders, coke, grindstones, and salt exported from the port, to be called the "River Tyne export dues," it is enacted by s. 2, the expression "coal dues," means the dues heretofore payable on coals, cinders, grindstones, and salt exported from the port.

By s. 3, that on and after the 1st of June, 1872, the coal dues shall be abolished, and in lieu thereof and in extinction of the right, power, or claim by the commissioners under the Harbour and Passing Tolls, &c., Act, 1861, to indemnify themselves for the loss of compensation paid to them for differential dues by raising any of the rates which they have power to levy, there shall be payable to the commissioners in respect of coals, cinders, coke, grindstones, and salt, exported from the port, the following dues, that is to say, in respect of coals, cinders, and coke, 1*d.* per ton of 20 cwt.; in respect of grindstones, 3*d.* per ton of 20 cwt.; and in respect of salt 1*d.* per ton of 20 cwt.; which dues shall be called "River Tyne export dues," and shall be carried to the account called "The Tyne Improvement Fund," and shall be applicable to all purposes to which the Tyne Improvement Fund shall from time to time be applicable.

On the 19th of April, 1873, a Norwegian steam-vessel called the *Hakar Adolstein* sailed from the port of Newcastle-on-Tyne with 530 tons of coal, alleged to be bunker coal, or coal for ship's use on board.

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The defendant, who was the duly authorized collector of dues for the Tyne Improvement Commissioners, demanded from the plaintiff, who was the master of the steam-vessel, a due of 1*d.* per ton, amounting to the said sum of 2*l.* 4*s.* 2*d.* in respect of the said 530 tons of coal. The plaintiff at first refused to pay, upon the ground that the coal was intended solely for ship's use, but afterwards he paid under protest.

It was admitted by the parties that the vessel cleared for the port of Christiania in Norway, taking in goods at Newcastle for New York, and proceeded to Christiania, and from thence, via Bergen, to New York, her ultimate port of destination; that 45 tons of coal would be required for the purpose of navigation from the Tyne to the port of Christiania, and 300 tons for a voyage from Christiania to New York.

Evidence was given of the usage of the port as regards bunker coal, or coal for ships' use, from the year 1840, and it was proved that, with the exception of about ten days in the year 1870, the corporation of Newcastle (to whom the dues were then payable) has never attempted to levy dues on such coal; that at the expiration of those ten days the corporation had stopped the levy, and had returned the sums paid during those ten days to those who asked for a return; and that the commissioners had not, until ten months after the passing of the Tyne Coal Dues Act, 1872, attempted to levy dues in respect of such coal; and it was also proved that dues are not charged on coal used for raising steam in the steam-tugs employed in towing vessels in and out of the harbour.

The judge, having regard to the usage of the corporation up to the year 1870, while the coal dues belonged to them, of treating "bunker" coals as exempted from duty, and considering that "exported" had acquired a secondary meaning of "carried out of the port for commercial purposes," was of opinion that the plaintiff was entitled to recover. But he was also of opinion that the commissioners were entitled to restrict the exemption to such a quantity of coals as shall be reasonably required for the purposes of the ship in each particular case. And the judge gave judgment for the plaintiff for 345 tons, the minimum quantity required

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for a voyage to New York, together with 20 per cent. for additional consumption to meet contingencies of the voyage.

Judgment was accordingly given for 1*l.* 14*s.* 6*d.*

The question for the Court was whether the plaintiff was entitled to that or any other sum.

June 2. *Sir J. B. Karslake, Q.C.* (with him *Bruce*), for the defendant, contended that on the true construction of ss. 2 and 3 of the Act of 1872, all coal "exported," that is, "taken out" of the port, was liable to duty; and the defendant was therefore entitled to the verdict.

Manisty, Q.C. (with him *Beresford*), for the plaintiff, contended that "exported" must be taken in the more restrictive sense of exported for the purpose of sale, and for this they referred to the definitions in Richardson's, Webster's, McCulloch's, and Ogilvie's Dictionaries.

Sir J. B. Karslake, Q.C., in reply, referred to s. 19 of 18 & 19 Vict. c. 96, the Customs Act, in which, while imposing duties on all spirits "imported or exported" from the Channel Isles, there is an express proviso exempting spirits taken out or brought in on board ship for the ship's use, that is, for the use of the crew or passengers.

Cur. adv. vult.

June 5. The judgment of the Court (Mellor, Lush, and Archibald, JJ.), was delivered by

LUSH, J. The question raised by this appeal is whether coals, taken out of the port of Newcastle in a foreign steamer for the purpose of consumption on board in the course of a foreign voyage, are liable to the coal dues of one penny per ton, granted to the Tyne Improvement Commissioners by the Tyne Coal Dues Act, 1872, on all coals exported from the port of Newcastle. The learned judge of the county court considered, that, having regard to the usage of the corporation while the coal dues belonged to them of treating coals taken on board for consumption as exempted from duty, the term "exported" must receive a qualified interpretation and be taken to mean coals exported for the purpose

of commerce, as distinguished from what are called "bunker coals," that is, coals taken on board for the purpose of consumption on the voyage. We agree as to the reasonableness of making a distinction between coals taken away for sale and coals taken for the necessary use of the vessel; but we are constrained to differ from the learned judge in his construction of the Act. There is nothing in the language of the Act to shew that the word "exported" was used in any other than its ordinary sense, namely, "carried out of the port;" and considering how easily and how extensively the privilege of storing for use may be abused, and what quantities may be carried away under the name of bunker coals, we think that, if it had been intended to exempt from duty coals taken on board for fuel, some limitation as to quantity would have been imposed. Nothing would have been easier than to insert a proviso to that effect. We cannot, however, speculate upon the intentions of the legislature which are neither expressed in terms nor conveyed by implication; our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything to be found in the context. Construing the words of the Act upon this principle, we feel bound to hold that coals carried away from the port, not on a temporary excursion, as in a tug or pleasure-boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals "exported" within the meaning of the Act.

We therefore give judgment for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *John Tucker.*

Attorneys for defendant: *Cookson, Wainewright, & Pennington, for J. & N. G. Clayton, Newcastle.*

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May 22.

HOWELL *v.* COUPLAND.

Construction of Contract of Sale—Sale of Part of specific Crop—Sale of "200 Tons of Potatoes grown on Seller's Land in W."—On Failure of Crop, Seller excused Performance.

Plaintiff and defendant entered into an agreement in March, whereby defendant agreed to sell and plaintiff to purchase "200 tons of regent potatoes grown on land belonging to defendant in W., at rate of 3*l.* 10*s.* 6*d.* per ton, to be delivered in September or October, and paid for as taken away." In March defendant had sixty-eight acres ready for potatoes, which were sown, and were amply sufficient to grow more than 200 tons in an average year; but in August the potato blight appeared and the crop failed, so that the plaintiff was able to deliver only 80 tons. The plaintiff having brought an action for the non-delivery of the other 120 tons:—

Held, that the contract was for a portion of a specific crop, and was within the principle of *Taylor* v. *Caldwell* (3 B. & S. at pp. 833–834), and the contract must be taken to be subject to the implied condition that the parties shall be excused, if, before breach, performance becomes impossible from the perishing of the thing without default in the contractor.

Declaration, that plaintiff bought of defendant 200 tons of potatoes at 3*l.* 12*s.* 6*d.* per ton; that plaintiff had delivered 80 tons, but had not delivered the residue.

Pleas, inter alia: 4. That it was agreed between plaintiff and defendant that it should be a condition precedent to the performance of the alleged promise by defendant that the potatoes at the date of the promise growing on defendant's land at Whaplode should when taken up amount to 200 tons; that when taken up, the potatoes did not amount to 200 tons, and the defendant therefore did not deliver 200 tons, which is the breach alleged.

5. That it was a term in the contract that defendant should not be bound to deliver 200 tons of potatoes unless his crop growing at the time of the contract should produce that quantity, and that if the crop should not produce so much, then defendant should deliver all that it did produce, except such portion as was necessary for the use of defendant and his labourers; that the crop did not produce 200 tons, and defendant duly delivered all that it did produce, with the exception aforesaid.

Issue joined.

At the trial before the late Chief Justice Bovill, at the Lincoln-

shire spring assizes, 1873, it appeared that the plaintiff and defendant in March, 1872, entered into the following agreement :—

"Memorandum of agreement made this —— day of ————, 1872, between R. Coupland and J. Howell, whereby Coupland agrees to sell and Howell to purchase 200 tons of regent potatoes, grown on land belonging to Coupland in Whaplode, at the rate of 3*l.* 10*s.* 6*d.* per ton, to be riddled one inch five-eighths riddle, and delivered at Holbeach Railway Station, good and marketable ware, during the months of September or October, as Howell may direct, and under his direction; the purchaser to find riddles. And it is further agreed between the parties that the potatoes shall be paid for when and as they are taken away."

In March, 1872, defendant had sixty-eight acres ready for potatoes, twenty-five acres having been already sown, the other forty-three acres were afterwards sown; and the acreage was amply sufficient to grow more than 200 tons in an average year. In July the crop promised well; but in August the potato blight appeared, and the crop failed; and the defendant was able to deliver only 80 tons (1); on which the present action was brought for the non-delivery of the other 120 tons.

A verdict was found for the plaintiff for 432*l.*, leave being reserved to move to enter the verdict for the defendant.

A rule was obtained accordingly, on the ground that the defendant was not bound to deliver the ungrown potatoes.

D. Seymour, Q.C., and *Waddy, Q.C.*, shewed cause. This was an absolute contract to deliver 200 tons of regent potatoes, with the additional warranty that they should be grown on defendant's land. In *Taylor* v. *Caldwell* (2) it is said in the considered judgment of the Court: "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in Roll. Ab. 450, Condition (G), and in the

(1) It seems to have been conceded at the trial that 80 tons was all the defendant could deliver.

(2) 3 B. & S. at p. 833; 32 L. J. (Q.B.) at p. 166.

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note 2 to *Walton* v. *Waterhouse* (1), and is recognised as the general rule by all the judges in the much-discussed case of *Hall* v. *Wright*." (2)

[BLACKBURN, J., referred to *Hills* v. *Sughrue* (3) and *Rugg* v. *Minett*. (4)

ARCHIBALD, J. This is a contract for part of a specific crop; is there any distinction between a contract for part of a specific thing and a contract for the whole?]

This cannot be a contract for a specific thing; the potatoes were not sown when the contract was made. It is an absolute contract on the part of the defendant to grow on his land and deliver 200 tons of regent potatoes; it is like a contract to load so many tons of coals on board a vessel, the performance of which is not excused, though prevented by vis major, such as a sudden frost: *Kearon* v. *Pearson*. (5)

[ARCHIBALD, J. No doubt, if the defendant has made such an absolute contract he must abide by it, though the performance has become impossible: *Jones* v. *St. John's College*. (6) But is this an absolute contract?

QUAIN, J. It is more like the contract in *Robinson* v. *Davison*. (7)]

Field, *Q.C.* (with him *Beasley*), in support of the rule. The question is, what is the true construction of this contract? A covenant or agreement to do a certain thing need not be necessarily absolute; it depends on the intention of the parties: *Clifford* v. *Watts*. (8) Here the contract was not absolute to supply 200 tons of regent potatoes, but to deliver 200 tons out of a particular crop to be grown on the defendant's land in a particular place; and the doctrine of *Taylor* v. *Caldwell* (9) as to a contract with relation to a specific article applies; which is that a contract as to the delivery of a specific thing or part of a specific corpus is presumed to be based on the existence of the thing when the time for delivery comes. The principle of this case has been

(1) 2 Wms. Saund. 421 *a*. 6th ed.
(2) E. B. & E. 746; 27 L. J. (Q.B.) 345.
(3) 15 M. & W. 253.
(4) 11 East, 210.
(5) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(6) Law Rep. 6 Q. B. 115.
(7) Law Rep. 6 Ex. 269.
(8) Law Rep. 5 C. P. 577.
(9) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

approved and adopted in the American courts: see *Dexter* v. *Norton*. (1) [He was then stopped by the Court.]

BLACKBURN, J. We are agreed that on this contract the defendant is entitled to succeed. The contract is for the sale of 200 tons of regent potatoes, grown on land belonging to the defendant in Whaplode, to be delivered during September and October, and to be paid for as taken away. We have to say what that means, looking at the terms of the contract itself and the circumstances under which it was made. At the time the contract was made, in March, the defendant had about sixty-eight acres ready for potatoes, of which some were already sown, and the rest were about to be sown, and were sown with potatoes in the usual course. Looking at these facts and the terms of the contract, it cannot mean anything else than that the plaintiff agrees to purchase and the defendant to sell 200 tons of the particular crop of potatoes which it is expected these sixty-eight acres will produce. If that is the contract, it is a contract for the delivery at a future time of a specific thing, so far as this, that it is for the delivery of a portion of a specific thing. It is just like the case of a contract for the purchase of 10 or 100 tons of a cargo of goods out of a particular ship to arrive, which must be so many tons out of the bulk on board the ship named. It is true the precise number of acres sown or to be sown was not mentioned; but the contract is made definite by the mention of land belonging to the defendant in a particular place, making it a contract for 200 tons of the particular crop to be grown on those fields. The principle of *Taylor* v. *Caldwell* (2), which was followed in *Appleby* v. *Myers* (3) in the Exchequer Chamber, at all events, decides that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to it perishing without any default in the seller, the delivery is excused. Of course, if the perishing were owing to any default of the seller, that would be quite another thing. But here the crop failed entirely owing to the blight, which no skill, care, or diligence of the defendant could prevent; does that excuse the performance of the contract when the contract was to deliver only a portion of the specific thing? It seems to me that it makes no

(1) 47 New York Rep. 62. (2) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(3) Law Rep. 2 C. P. 651.

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difference; and that the ruling in *Taylor* v. *Caldwell* (1) applies; that is, that, if from the nature of things the thing to be delivered is liable to perish, then there is an implied condition that, if the delivery becomes impossible owing to the thing perishing without default of the seller, he is excused; and the same principle must apply where the contract is only for a portion of a specific thing. Had the contract been simply for so many tons of potatoes of a particular quality, then, although each party might have had in his mind when he made the contract this particular crop of potatoes, if they had all perished, the defendant would still have been bound to deliver the quantity contracted for; for it would not have been within the rule of a contract as to a specific thing. But the contract was for 200 tons of a particular crop in particular fields, and therefore there was an implied term in the contract that each party should be free if the crop perished. The property and risk had clearly not been transferred under the terms of this contract, so that the consequence of the failure of the crop is, that the bargain is off so far as the 120 tons are concerned.

QUAIN, J. I am of the same opinion. The contract is for the sale of 200 tons of regent potatoes grown on a particular farm in possession of the defendant; therefore no regent potatoes, except they were grown on that farm, would satisfy the contract; and if, as it seems to me, it was essential to satisfy the contract that the potatoes should be grown on that particular farm, then the contract is for part of a specific thing, viz. the crop off those particular fields. If the contract had been for the whole, it seems to be conceded that the failure of the crop would have excused the defendant; but there can be no distinction in principle whether the contract be for the whole or only part of a particular crop, the same rule must govern in either case; and the doctrine of *Taylor* v. *Caldwell* (1) applies. The contract contemplates, whether it be for the whole or only 200 tons of the crop, that the potatoes shall be produced on this particular land; and if none are produced owing to the blight, then owing to the intervention of vis major, or the act of God, the parties are excused from the performance of the contract on either side. In Sheppard's Touchstone, p. 382, it is said:

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

"Where the condition of an obligation is to do one of two things by a day, and at the time of making the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act of the obligee himself; in this case the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation And when the condition of an obligation is to do one single thing, which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet if it be possible to be done in any part, it shall be performed as near to the condition as may be." Here the defendant does deliver 80 tons, all that he is able to deliver. There is no question of default or negligence on the part of the defendant, nor have we to consider whether more land ought to have been sown. The single question is whether this was not a contract to deliver 200 tons of the potatoes which a particular land is expected and ought to have produced, whereas the land, owing to a cause over which the defendant has no control, does not produce 200 tons altogether, and if such be the contract, whether the defendant is not excused. I think that he clearly is excused.

ARCHIBALD, J. The only reasonable construction of this contract is that it is for the delivery of 200 tons of a specific crop of potatoes about to be sown on specific land. The case is therefore governed by the decision in *Taylor* v. *Caldwell* (1), that there is in such a contract an implied condition that when the time for delivery comes the article contracted for should be in existence; and the defendant is excused if he is prevented from delivering it by a cause over which he has no control. There can be no distinction whether the contract be for the entire crop or only for a part, viz. so many tons. The defendant, therefore, is excused, and this rule must be made absolute.

Rule absolute.

Attorneys for plaintiff: *Monkton & Co. for Ayliff, Holbeach.*

Attorneys for defendant: *Wright, Bonner, & Wright, for Bonner & Calthrop, Spalding.*

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

1874
May 27.

THE KIRKSTALL BREWERY COMPANY *v.* THE FURNESS RAILWAY COMPANY.

Evidence—Principal and Agent—Statement of Agent acting within Scope of his Authority—Railway Company—Statements of Station-master to Police as to Loss of a Parcel.

In an action against a railway company for the loss of a parcel containing money, the defendants pleaded the Carriers Act, and plaintiffs replied that the parcel was lost by the felonious act of one of the company's servants. It was proved that the parcel was sent on Wednesday, the 27th of July, by the defendants' railway, addressed to a clerk of plaintiffs at U., where there was a station on defendants' railway. That the parcel was not delivered, and on the same day H., a porter in the defendants' service at U. station, disappeared. A superintendent of police at U. gave, after objection by defendants, the following evidence:—"I know P., the station-master at defendants' railway station at U. In consequence of a communication, I went to him on Saturday, the 30th of July. He told me that H., a parcel porter, had absconded from the service; that a money parcel was missing, and he, P., suspected H. had taken it; would I (the witness) make inquiries after him?" A verdict having passed for plaintiffs:—

Held, that the evidence was rightly admitted: for that it must be taken that the station-master, being the person in charge there, had authority from the defendants to set the police in motion, and that what he said pertinent to the occasion, when acting within the scope of his authority, was evidence against the defendants.

Declaration that plaintiffs caused to be delivered to defendants, being common carriers of goods, a parcel containing 35*l.* in bank-notes and gold, to be carried from Whitehaven to Ulverston; that defendants did not deliver the parcel, and it has been wholly lost to plaintiffs.

Pleas, inter alia: 3, that the parcel contained money, and was within the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68); and that the nature of the contents was not declared and the extra charge paid when the parcel was delivered to defendants.

Replication: that the loss of the parcel arose from the felonious act of a porter or servant of the defendants, and the non-delivery of the parcel was caused by such felonious act.

Issue joined.

At the trial before Denman, J., at the sittings in Middlesex after Trinity Term, 1873, it appeared in evidence that an agent of the plaintiffs, on Wednesday, the 17th of July, 1872, sent a parcel

containing 35*l.* in notes and gold from the Whitehaven station of the defendants' railway, addressed to a clerk of the plaintiffs, "Mr. Gardner, Kirkstall Brewery Company's Stores, Ellers, Ulverston" (where there is a station of the defendants), and paid 6*d.* carriage. That the parcel was not delivered to Gardner; and on the same day John Haslam, a porter in the defendant's service at their Ulverston station disappeared, and had never been found since.

George Holden, a superintendent of police, was then called on behalf of the plaintiffs, and, after objection by defendants' counsel, gave the following evidence: "I am superintendent of police at Ulverston. I know Podmore, the station-master at defendants' station at Ulverston; in consequence of a communication in writing I went to him on Saturday, the 20th of July. He told me that a man of the name of John Haslam had absconded from the service; that a money parcel was missing, and he (Podmore) suspected Haslam had taken it. He said Haslam was the parcel porter. Would I (witness) make inquiries about him?"

The learned judge left it to the jury to say, whether they thought it was established that the parcel was stolen by one of the defendants' servants. The jury found a verdict for the plaintiffs for 35*l.*

A rule was afterwards obtained for a new trial, on the ground of misreception of the above evidence.

Sir H. James, Q.C., and *Reid*, shewed cause. It is clear, on the authority of *Moore* v. *Metropolitan Ry. Co.* (1) and *Goff* v. *Great Northern Ry. Co.* (2), that Podmore, the station-master, acting as one having authority in that behalf, must be taken, in the absence of evidence to the contrary, to be the person authorized by the defendants to set on foot inquiries after a servant of the defendants who had disappeared under suspicious circumstances. If, then, Podmore was acting within the scope of his authority as the defendants' agent to set on foot these inquiries, what he said on such an occasion is admissible in evidence just as much as if it had been said by one of the parties to the action, supposing the defendants to have been individual carriers and not a company.

(1) Law Rep. 8 Q. B. 36. (2) 3 E. & E. 672; 30 L. J. (Q.B.) 148.

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In Story on Agency, § 134, it is said: "Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the res gestæ." And in the last edition an American case is cited, *Morse* v. *Connecticut River Railroad* (1), in which it was held, that the admissions of the defendants' conductor, baggage-master, or station-master, as to the manner of the loss, were admissible in evidence in an action against a railway company for the loss of a passenger's portmanteau.

Price, Q.C., and *Crompton*, in support of the rule. Admitting the station-master to have been the defendants' agent to make inquiries or set inquiries on foot as to the loss of the parcel, still that does not make what he says, while making inquiries or setting inquiries on foot, evidence as admissions against the defendants. Moreover, the fact that the defendants had a suspicion against Haslam does not go to prove he really stole the parcel.

[QUAIN, J. The question on this rule is only as to the admissibility of the evidence; but *Vaughton* v. *London and North Western Ry. Co.* (2) shews that to prove the issue of felony by defendants' servants it is not necessary to give evidence sufficient to convict a particular servant of felony.]

The case of *Great Western Ry. Co.* v. *Willis* (3) is stronger than the present. There the answers made by a person, whose duty it was to forward the cattle in question, to inquiries as to the reason they were not forwarded, was held inadmissible against the defendants.

[*Sir H. James, Q.C.* There the person giving the answers was not acting within the scope of his duty; the inquiries were not made till a week after the occurrence of the delay.]

COCKBURN, C.J. I am of opinion that the rule must be discharged on the ground that the evidence was admissible under the particular circumstances of the case. A man, a railway porter at the station to which the parcel is addressed, is believed to have absconded with a parcel of money, which must be taken to have

(1) 6 Gray, 450.
(2) Law Rep. 9 Ex. 93.
(3) 18 C. B. (N.S.) 748; 34 L. J. (C.P.) 95.

been the plaintiffs' money. The parcel and man disappear simultaneously, and the man was the person to whom, in due course, the parcel would have been delivered; there was, therefore, reasonable and probable cause for arresting him on the charge of taking the parcel. Suppose the principal in this case had been an individual, and had gone to a policeman and said, "A parcel has been taken from my premises, and I cannot doubt it has been taken animo furandi, for the person to whom it was delivered has absconded just at the time the parcel was missed, I therefore believe him to be the thief; I ask you to make inquiries and to apprehend him if you find him under suspicious circumstances." There is no principle on which that would not be admissible evidence. Then, if Podmore was the agent of the defendants, and if it was within the scope of his duty and authority as agent to do what the principal, if on the spot, would have done, what he says while he is so acting is equally admissible as if said by the principal himself. Now, it is impossible to say, that the man who has the sole management of the station has not authority to cause a person to be apprehended whom he has reasonable ground to suspect has stolen a parcel from the station. Therefore Podmore had authority to cause inquiry to be made after Haslam, and to cause him to be apprehended, and if so, then it was within his duty and authority to make communications to the police. In other words, the effect of the particular circumstances of this case was to make the statement of Podmore to the police superintendent, on the occasion in question, the statement of a person having authority on the part of the company to make it.

QUAIN, J. I entirely agree. Podmore had charge of the station, and had authority from the company, under the circumstances, to put the police in motion with a view to the inquiry as to who stole the missing parcel. And therefore what he says necessarily in order to put the police in motion, as to what has been lost and who he suspects has taken it, are statements made within the scope of his authority and bind the defendants. The case of *Goff* v. *Great Northern Ry. Co.* (1), shews that the person

(1) 3 E. & E. 672; 30 L. J. (Q.B.) 148.

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in authority on the spot must be taken to have authority to do what the exigency of the case requires. It appears to me, therefore, that the acts done and statements made at the time, provided they were necessary to the matter in hand, are binding on the company.

ARCHIBALD, J. I am also of opinion that the evidence was properly admitted. Was the station-master of the company agent of the company to make the statements in question so as to bind them in an action? If this had been the case of an individual carrier, instead of a company, the statements which he made on setting on foot an inquiry by the police would clearly have been admissible; and similar statements by an agent duly authorized to act in the matter must be equally admissible. Was then the station-master such an agent, so as to make his statements binding on the company? That depends on whether he had authority to act in the matter. Being in charge of the station, he must be taken to be the person authorized by the company to take proper steps when a parcel is supposed to have been stolen from the station. If the statements had been made to a stranger possibly they would not have been admissible, on the ground that he was not acting within the scope of his authority. But where they are made in the course of his duty in initiating proceedings and putting the police in motion, there they are made within the scope of his authority, and are therefore admissible and binding on the company.

Rule discharged.

Attorneys for plaintiffs: *Nash, Field, & Layton.*
Attorneys for defendants: *Sharp & Ullithorne.*

DIE ELBINGER ACTIEN-GESELLSCHAFFT FÜR FABRICATION VON EISENBAHN MATERIEL *v.* ARMSTRONG.

1874
July 6.

Contract, Breach of—Measure of Damages for Non-delivery of Article to be manufactured.

The defendant, in January, 1872, agreed to furnish plaintiffs with 666 sets of wheels and axles according to tracings, 100 of which were to be delivered at stated intervals in the months of February, March, and April free on board at Hull; guarantee three years and three months from time of shipments. The plaintiffs were under a contract with a Russian railway company to deliver them 1000 waggons, 500 on the 1st of May, 1872, and 500 on the 31st of May, 1873; and they were bound to pay two roubles per waggon for each day's delay in delivery. In the course of the negotiations between plaintiffs and defendant, defendant was informed of this contract, but neither the precise day for the delivery nor the amount of the penalties was mentioned. Delay occurred in the delivery of the 100 sets of wheels; and the plaintiffs, in consequence, had to pay certain penalties, but the Russian company consented to take one rouble a day, amounting in the whole to 100*l.*

The plaintiffs, having brought an action against the defendant for the delay, sought to recover as damages the 100*l.*:—

Held, that the plaintiffs were not entitled as damages, as matter of right, to the amount of penalties; but that the jury might reasonably have assessed the damages at that amount.

DECLARATION setting out an agreement (of which the material parts are stated in the judgment of the Court) by which defendant agreed to supply 666 sets of wheels and axles according to tracings, 100 pairs to be delivered at certain intervals in the months of February, March, and April, 1872, free on board at Hull. Guarantee three years and three months from time of shipments from Hull. That the defendant delayed delivery in the first 100 sets, whereby the plaintiffs suffered damage. (1)

Plea, inter alia, traversing the agreement as alleged.

At the trial before Lush, J., at the sittings in London after Hilary Term, 1873, a verdict passed for the plaintiffs for 100*l.* 13*s.*, with leave to the defendant to move to reduce the verdict to nominal damages.

The facts and circumstances of the trial are fully given in the judgment of the Court.

A rule having been obtained accordingly,

(1) The form in which the damages were laid is given in the judgment.

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May 7, 8. *W. Williams, Q.C.*, and *Cohen*, shewed cause. *Sir H. James, Q.C.*, and *Waddy, Q.C.*, in support of the rule. The arguments sufficiently appear in the judgment.

The following authorities, in addition to those noticed in the judgment, were cited:—*Hadley* v. *Baxendale* (1); *British Columbia Saw-mill Co.* v. *Nettleship* (2); *Smeed* v. *Ford* (3); *Ogle* v. *Earl Vane* (4); *Prior* v. *Wilson* (5); *Cory* v. *Thames Iron Works Co.* (6); *Horne* v. *Midland Ry. Co.* (7); *Sawdon* v. *Andrew* (8); *Tyers* v. *Rosedale Iron Co.* (9); *Gee* v. *Lancashire and Yorkshire Ry. Co.* (10); *Borries* v. *Hutchinson* (11); *Everard* v. *Hopkins* (12); Benjamin on Sale, p. 727 (2nd ed.).

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Blackburn, Lush, and Quain, JJ.), was delivered by

BLACKBURN, J. This was an action by a foreign corporation on a contract by which the defendant, on the 20th of January, 1872, agreed to furnish the plaintiffs' agents with 666 sets of wheels and axles, according to tracings, at the following prices and times of delivery, viz., 100 sets of tracing No. 1, at 32*l.* per set, of which were to be delivered in that year in Hull, 10 sets up to the 15th of February, 10 sets up to the 1st of March, 20 sets up to the 15th of March, 20 sets up to the 1st of April, and 40 sets up to the 15th of April. The contract specified the prices and times of delivery of the remaining 566 sets, on which nothing turned, and proceeded as follows:—"All the foregoing prices are understood of four wheels and two axles for deliveries free on board in Hull. Payment at buyer's option, either in three months approved bills at par or less 1½ discount for cash, fourteen days after date of bills of lading and shipment from Hull. Guarantee three years and three months from time of shipments from Hull, as customary."

The action was for delay in delivering the first 100 sets, and in

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.
(2) Law Rep. 3 C. P. 499.
(3) 1 E. & E. 602; 28 L. J. (Q.B.) 178.
(4) Law Rep. 2 Q. B. 275.
(5) 8 W. R. 260.
(6) Law Rep. 3 Q. B. 181.
(7) Law Rep. 8 C. P. 131.
(8) 30 L. T. (N.S.) 23.
(9) Law Rep. 8 Ex. 305.
(10) 6 H. & N. 211; 30 L. J. (Ex.) 11.
(11) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169.
(12) 2 Buls. 332.

the declaration damages were claimed in the following terms:— "Whereby the plaintiffs sustained great loss by being deprived of the said several sets for a long time after the said several agreed times, and by being prevented from carrying out and fulfilling certain contracts entered into by the plaintiffs for the supply of the said sets by the plaintiffs to a certain railway company in Russia, and by losing great profits which the plaintiffs would have made by carrying out and fulfilling the said contracts, and by being compelled to pay damages for not fulfilling the said contracts."

Various pleas were pleaded and issues joined on them; but at the trial before my Brother Lush, J., it was admitted that none of them could be supported, and that there had been delay beyond the stipulated times in delivering the 100 sets; and the only question was as to damages.

As to this the plaintiffs called a witness, who gave evidence that the plaintiffs were under a contract with a Russian railway company to deliver to them 1000 covered waggons, 500 on the 1st of May, 1872, and 500 on the 31st of May, 1873; and by the contract they were bound to pay to the Russian company two roubles per waggon for each day's delay in delivering them.

In the course of the negotiations between the plaintiffs and the defendant, which resulted in the written contract of the 20th of January, the defendant was informed that the plaintiffs wanted the wheels and axles to complete waggons which the plaintiffs were bound to deliver to a Russian company under penalties. Neither the amount of those penalties nor the precise day by which the plaintiffs were to deliver the waggons seems to have been mentioned; but, according to this evidence, the defendant was expressly told that he would be expected to deliver the sets on the days on which he agreed to deliver them; and, before entering into the contract, he said he must consult his foreman as to the state of his works, &c., to see within what time he could deliver them.

After this, the written contract was sent and accepted. The plaintiffs were unable to procure other sets of wheels, and consequently each day's delay in furnishing a set of wheels necessarily occasioned a day's delay in furnishing a waggon.

The waggons were not completed in time for the Russian com-

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pany, and penalties were incurred; but the company consented to remit half the penalties due to them, and the plaintiffs only paid one rouble a day for delay.

The plaintiffs claimed, as the measure of their damage, one rouble for each day's delay of each set of wheels and axles, and this, it was agreed, would amount to 100*l.* 13*s.*

The counsel for the defendant contended that there was no evidence here of any contract to pay penalties, and that the damages must be nominal. The judge was not asked by either side to leave any question to the jury, but directed the verdict to be entered for 100*l.* 13*s.*, with leave to the defendant to move to reduce the damages to a nominal sum; "it being taken that the jury have found the damages under my direction to be 100*l.* 13*s.*"

Sir Henry James, in Easter Term, 1873, obtained a rule to shew cause why the verdict should not be reduced to a nominal sum, on the ground that, on the evidence given at the trial, the plaintiffs were not entitled to recover any damages in relation to the penalties paid by them to the Russian company.

Owing to the unavoidable delay occasioned by the recent trial at bar, cause was not shewn till last term, when the case was argued before my Lord Chief Justice, my Brothers Lush and Quain, and myself, when the Court took time to consider.

We have no difficulty in saying that the defendant is not entitled to enter a verdict for nominal damages.

It is, no doubt, quite settled that, on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach.

Where, from the nature of the article, there is no market in which it can be obtained, this rule is not applicable; but it would be very unjust if, in such cases, the damages must be nominal; and there are several decisions shewing that such is not the law. In *Bridge* v. *Wain* (1), where the contract was to supply scarlet cuttings in China, and the articles supplied were not scarlet cuttings, Lord Ellenborough ruled that the plaintiffs were entitled to the value of scarlet cuttings in China. In *Borries* v. *Hutchinson* (2), where

(1) 1 Stark. 504. (2) 18 C. B. (N.S.) 445, 465; 34 L. J. (C.P.) 169.

the action was to recover damages for delay in delivering caustic soda, which it was admitted was an article which is not kept in stock, so as to be capable of being at any time bought in the market, and consequently there was no ascertainable market price. Willes, J., in that case, says: "In ordinary cases, where the article is one which can be bought in the market, the proper measure of damages for a breach of contract to deliver is the difference between the contract price and the market price on the day of the breach. There was no market price to which resort could be had as to a test of damage. We must therefore ascertain what was the value of the article contracted for at the time when it ought to have been and at the time when it actually was delivered."

In the case now at bar, without travelling out of the written contract, it is obvious, from its terms, that the sets of wheels and axletrees, being made according to tracings, could not be obtained in any market, but that, if they were not delivered according to the contract, the plaintiffs must wait till they could get them made elsewhere. And, from the stipulation at the conclusion of the contract, that there was to be a guarantee for three years and three months from time of delivery, it is equally obvious that both parties contemplated that the wheels and axles were to be put into immediate use. Under such circumstances, the natural and almost inevitable consequence of a delay in delivering a set of wheels would be that the plaintiffs, if they meant the waggon for their own use, or their customers, if the waggon was bespoke, would be deprived of the use of a waggon for a period equal to that for which the set of wheels was delayed.

At all events the plaintiffs were entitled to recover at a rate per day equal to whatever the jury should find to be reasonable compensation for the loss of the use of the waggons: see *Cory* v. *Thames Ironworks Co.* (1) We think, therefore, it would have been a misdirection if the jury had been directed to find no more than nominal damages.

We have had more difficulty in determining whether the plaintiffs are entitled to keep the verdict for the amount as it stands. If we thought that this amount could only be come at by laying

(1) Law Rep. 3 Q. B. 181.

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down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian company, we should pause before we allowed the verdict to stand. In *Hadley* v. *Baxendale* (1) it was decided that it was a misdirection in the judge not to tell the jury that, upon the facts before them, they ought not to take the loss of the profits into consideration at all in estimating the damages. That was because the Court thought that there was no evidence of any communication to the defendants of such facts as shewed that this unusual loss must ensue from the delay in sending on the broken shaft; and so far as the case decides that the defendant is not liable for any unusual consequences, arising from circumstances of which he has not notice, the case has often been acted upon. But an inference has been drawn from the language of the judgment, that whenever there has been notice at the time of the contract that some unusual consequence is likely to ensue if the contract is broken, the damages must include that consequence; but this is not, as yet at least, established law. In Mayne on Damages, p. 10 (2nd edition by Lumley Smith), in commenting on *Hadley* v. *Baxendale* (1), it is said: "The principles laid down in the above judgment, that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence which is not the necessary result of a breach can be supposed to have been so contemplated, unless it was communicated to the other party, are of course clearly just. But it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to shew that he was told that he would be answerable for them, and consented to undertake such a liability? . . . The law says that every one who breaks a contract shall pay for its natural consequences; and in most cases states what these consequences are. Can the other party by merely acquainting him with a number of further consequences, which the law would not have implied, enlarge his responsibility to the full extent of all those consequences, without any contract to that effect?"

We are not aware of any case in which *Hadley* v. *Baxendale* (1)

(1) 9 Ex. 341; 23 L. J. (Ex) 179.

has been acted upon in such a way as to afford an answer to the learned author's doubts; and in *Horne* v. *Midland Ry. Co.* (1) much that fell from the judges in the Exchequer Chamber tends to confirm those doubts. But we do not think it necessary here to decide any such question.

As the plaintiffs did not actually lose more than a rouble a day, which they paid, that forms the extreme limit of the damage they can recover, for they are not entitled to make a profit out of the defendant's default. Had the amount of damages been actually left to the jury, the question would have been whether the defendants were liable for as much. If the judge had told the jury expressly that the penalties as such could not be recovered, but that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary, the direction would not, at all events, have been too unfavourable to the defendant.

We think that, if so directed, a jury in all probability would, and certainly reasonably might, have assessed the damages at 100*l.* 13*s.*, which, after all, is no heavy percentage, the contract price being 3200*l.*

We think we must construe the reservation as meaning that the verdict should stand if the jury properly directed might reasonably have found this sum.

The rule therefore must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Hollams, Son, & Coward.*

Attorneys for defendant: *Learoyd, Learoyd, & Peace.*

(1) Law Rep. 8 C. P. 131.

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July 6.

MORISON *v.* THOMPSON.

Action for Money had and received—Principal and Agent—Receipt by Agent of Purchaser of Money from Vendor.

The plaintiff authorized defendant, as his broker, to negotiate for the purchase of a particular ship on the basis of an offer of 9000*l.*, but eventually the ship was purchased through defendant for 9250*l.* Prior to the sale, an arrangement had been made between the vendor and a broker, S., that if S. could sell the ship for more than 8500*l.* he might retain for himself the excess; and it was arranged between S. and defendant, without the knowledge or sanction of plaintiff, that defendant should receive from S. a portion of such excess; and accordingly defendant received 225*l.*, part of the excess over 8500*l.* On discovering this, the plaintiff brought an action for money had and received for the 225*l.* In addition to the above facts, the jury found that defendant was the agent of plaintiff to purchase the ship as cheaply as she could be got, and that plaintiff could have got her cheaper but for the arrangement between the vendor and S.:—

Held, that the action would lie.

Declaration for money had and received. (1)

Plea, never indebted.

At the trial before Cockburn, C.J., at the sittings in London after Michaelmas Term, 1872, a verdict was entered for the plaintiff for 225*l.*, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that money had and received could not be maintained on the facts.

A rule having been obtained accordingly,

April 23, 27. *Field, Q.C.*, and *Lanyon*, shewed cause.

Sir J. B. Karslake, Q.C., and *Arbuthnot*, in support of the rule.

The facts and arguments are fully stated in the judgment.

All the authorities cited are noticed in the judgment.

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Blackburn and Archibald, JJ.), was delivered by

Cockburn, C.J. This was an action by the purchaser of a steamship called the *Atrato*, to recover from the defendant, who had been employed by him as his broker to purchase the ship as cheaply

(1) There was also a special count, but nothing turned on that, as the verdict at the trial was entered for the plaintiff on the money count only.

as he could, the sum of 225*l.*, which had been received by the defendant from the broker of the vendor by way of commission on the sale. It appeared at the trial, that after some preliminary negotiations the plaintiff had authorized the defendant to negotiate for the purchase of the ship on the basis of an offer of 9000*l.*; but eventually the ship was purchased through the defendant for 9250*l.* Some time prior to the sale an arrangement had been made between the vendor and a broker named Scott, through whom the ship was sold, that if Scott could sell the ship for more than 8500*l.* he might retain for himself whatever could be obtained in excess of that amount. The defendant was aware of this arrangement at the time when he was negotiating with Scott for the purchase of the vessel, but it was unknown to the plaintiff; and before the sale it was arranged between Scott and the defendant, without the knowledge or sanction of the plaintiff, that the defendant should receive from Scott a portion of such excess of purchase-money.

The vessel having been sold for more than the 8500*l.*, the sum of 225*l.*, part of the excess, being the sum for which this action was brought, was without the knowledge or sanction of the plaintiff paid by Scott to, and retained by, the defendant.

It was found by the jury, first, that the defendant was the agent of the plaintiff for the purpose of purchasing the ship as cheaply as she could be got: and, secondly, that the plaintiff could have got the vessel cheaper but for the arrangement between the vendor and Scott; and a verdict was thereupon entered for the plaintiff for 225*l.* on the count for money had and received, with leave to move to enter a verdict for the defendant.

In Hilary Term, 1873, a rule was obtained to enter the verdict for the defendant, and the only question raised upon the rule is, whether the plaintiff is entitled to recover the money in question under the common count for money had and received.

It was contended, in support of the rule, that the only form of action maintainable, if at all, under the circumstances against the defendant, was an action to recover damages for breach of duty; that in such an action the amount received by the defendant from Scott would not necessarily be the true measure of damages; and that it could not be regarded as the money of the plaintiff, or as

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received for his use. It was contended, further, that at the utmost the defendant could only be regarded as trustee for the plaintiff of the money in question, and that, being only entitled to it in equity, the plaintiff could not maintain an action to recover it at law.

The contention as to the form of action proceeded mainly upon the authority of a note of Messrs. Hargrave and Butler, in their edition of Coke upon Littleton (1), in which the learned editors, after discussing the question as to the right of a master to the earnings of his apprentice or servant, proceed to say: "Some of the cases go so far as to give the master a right to the wages or earnings, whether the service [that is, to a third person] is performed by the apprentice with or without the master's licence; and even though the earnings accrue in a trade or service different from that to which the apprentice is bound." They add: "Independently, too, of authority, the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action, either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract; such a case rather importing the master's right to damages for injury sustained by the consequences of the second retainer than a right to the profits accruing from it."

With great respect, however, to the learned editors, their doubt as to the right of the master, under the circumstances supposed, to the profits accruing from the service, is at variance with the cases cited by them in the note. The case which seems to have suggested their observation as to the form of action is a case of *Treswell* v. *Middleton* (2), in which, on error from the Common Pleas, it was held that a declaration for work and labour done by a servant must state it to have been done by the master or on his account. But this evidently proceeds on the ground merely that there is in such case no privity of contract between the master and the person employing his servant; and the case by no means justifies any doubt as to the right of the master as between him and his servant to the earnings of the latter; and certainly is no authority that, if the earnings have been received by the servant, the master may not sue for them as money received to his use.

(1) Co. Litt. 117. a (note 161). (2) Cro. Jac. 653.

The remaining cases cited in the note directly support the conclusion, that whenever the earnings acquired in the service of a third person have reached the hands either of the servant or the master, they must be regarded as belonging to the master. In the first of these, *Barber* v. *Dennis* (1), the widow of a waterman, who by the usage of Waterman's Hall, had taken an apprentice, had had her apprentice impressed, taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the hands of the defendant; and it was held that the widow was entitled to maintain trover against the defendant, on the ground that the possession of the apprentice was that of the master, and that whatever he earns shall go to his master.

In the next, an anonymous case, in Modern Reports (2), it was said that trover lies by the master for the ticket or other writing entitling his apprentice to money earned by him during his apprenticeship; but in the particular case, inasmuch as the action was against the executor of the apprentice for money earned by him during his apprenticeship, and it never was in the apprentice's possession, it was held that the action was not maintainable: but it was said that after the executor receives the money the master may have assumpsit for so much money received to his use.

Nor are these principles confined to the case of service by apprentices. They apply to all cases of employment as servants or agents, the profits acquired by the servant or agent in the course of, or in connection with, his service or agency, belonging to the master or principal.

In *Rogers* v. *Boehm* (3) Lord Kenyon ruled at nisi prius that interest made by an agent by the use of his principal's money belonged to the latter, and might be recovered by him in an action for money had and received. In the case of *Thompson* v. *Havelock* (4), the plaintiff, the captain of a ship, sought to recover from the shipowner money, which, in letting the ship to Government for six months, the captain had stipulated with the Government officer by whom the ship was taken up should be paid to him for his own benefit, in addition to the freight, and which had come into the hands of the shipowner; and it was held that the plaintiff

(1) 6 Mod. 69.
(2) 12 Mod. 415.
(3) 2 Esp. 702.
(4) 1 Camp. 527.

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was not entitled to recover, in other words, that as between him and his employer, the shipowner, the money belonged to the latter. Lord Ellenborough, in his summing-up, is reported to have said: "Is it contended that a servant, who has engaged to devote the whole of his time and attention to my concerns, may hire out his services or a part of them to another? It would have been a different thing, if the owner had been suing for this money; but I am clearly of opinion that, at all events, the present plaintiff has no right to it." He adds: "I don't know how far it might go if such earnings could be recovered in a court of justice. No man should be allowed to have an interest against his duty." This ruling was acquiesced in, and was subsequently followed by Lord Ellenborough in the case of *Diplock* v. *Blackburn* (1), in which the master of a ship in a foreign port claimed to retain for his own benefit the premium received by him upon a bill drawn upon England on account of the ship, on the ground that there had been a usage for masters of ships to appropriate such premiums to their own use. But Lord Ellenborough held that the money belonged to the owner and not to the captain, and stigmatised the usage set up as a usage of fraud and plunder. "What pretence," he says, "can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty."

The cases in equity are to the same effect, viz. that the profits, directly or indirectly made in the course of or in connection with his employment by a servant or agent, without the sanction of the master or principal, belong absolutely to the master or principal: *Massey* v. *Davies.* (2)

It may be sufficient to refer particularly to the two most recent cases on the subject. In *Turnbull* v. *Garden* (3) an army agent and contractor was employed by the plaintiff to provide for her son (who was about to proceed to India) a reasonable outfit; and accordingly the articles composing such outfit were paid for through the defendant, who debited the plaintiff in account with the full amount of the invoice prices charged by the tradesmen supplying the outfit, though discount had been allowed him in each instance.

(1) 3 Camp. 43. (2) 2 Ves. jun. 317.
(3) 38 L. J. (Ch.) 331, 334.

This was done by him on the ground, as alleged, that it was the universal practice as between tradesmen and army agents; but the plaintiff had no actual knowledge of such practice. An action was afterwards commenced by the defendant in the Mayor's Court against the plaintiff to recover the balance of his account, and certain moneys deposited by her in the London and Westminster Bank in the City were attached to answer the claim; and a bill was thereupon filed by the plaintiff praying a general account, and an injunction to restrain the further prosecution of the action. The Court directed the account to be rectified by disallowing, as against the plaintiff, the full amount of the discounts retained by the defendant; Lord Justice James (then Vice-Chancellor) observing: "What appears in this case shews the danger of allowing even the smallest departure from the rule, that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting."

In the subsequent case of *Kimber* v. *Barber* (1), the plaintiff being desirous of procuring shares in a company, the defendant had represented to him that he could procure some at 3*l.* per share; plaintiff agreed to purchase at that price, and certain shares were thereupon transferred, part to the plaintiff and part to his nominee, and were paid for at 3*l.* per share. The plaintiff subsequently discovered that the defendant was himself the owner of the shares and had lately purchased them for 2*l.* per share. It was held, on appeal, reversing the decision of the Master of the Rolls, that the defendant was an agent for the plaintiff; and he was ordered to pay back the difference in the price of the shares.

The law on the subject is well and compendiously stated in Story on Agency, § 211, in the following terms: "Indeed, it may be laid down as a general principle, that, in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers." See also § 207.

In Paley on Principal and Agent, p. 51, it is said: "And not

(1) Law Rep. 8 Ch. Ap. 56.

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only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. So that if an agent who has purchased goods according to order sell them again to advantage, with the view of appropriating the gain to himself, although he should have answered the loss, if any, yet his employer is entitled to the profits."

In our judgment the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer.

This was precisely the case in regard to the money in question acquired by the defendant in the course of his employment without the knowledge or sanction of the plaintiff; it was actually in his hands, subject to an immediate duty to hand it over to his employer. Under such circumstances the money, being the property of the employer, can only be regarded as held for his use by the agent, and must consequently be recoverable in an action for money had and received.

We are clearly of opinion that it is so recoverable under the common count, and that this rule, therefore, must be discharged.

Rule discharged.

Attorneys for plaintiff: *Crossly & Burn.*

Attorneys for defendant: *Shum, Crossman, & Crossman.*

TAYLOR *v.* SAMUEL GREENHALGH.

1874
July 6.

Negligence—Principal and Agent—Surveyor of Highways, Liability of, for improper State of Road—5 & 6 Wm. 4, c. 50, s. 56.

Defendant was surveyor of highways appointed by vestry at a salary. By a resolution of the committee of management it was ordered that a part of a road should be raised for about 150 yards, and that defendant should employ men to do it. Defendant contracted with G. to do the work at so much per yard, the vestry finding the materials. G. proceeded to do the work, employing his own men. During the progress of the work one half of the width of the road was raised first, and the other half left temporarily about a foot lower. No fence or light was put up to warn persons using the road at night, and the plaintiff driving with a horse and dog-cart was upset and injured. The defendant had not personally interfered in doing the work, or in directing the road to be left as it was:—

Held, that the defendant was not liable for the injury to the plaintiff, either at common law or by reason of s. 56 of 5 & 6 Wm. 4, c. 50.

DECLARATION that defendant wrongfully and improperly placed upon certain parts of a certain highway large quantities of earth, stones, rubbish, and materials, and caused the highway to be raised in the said parts, and thereby to be dangerous to persons driving along the highway in the dark; and defendant wrongfully and improperly suffered the stones, &c., to remain upon the highway and the parts of the highway so raised during the dark, without any light or means to prevent persons from driving against the same, whereby a carriage in which the plaintiff was being driven was driven and struck against the stones, &c., and plaintiff was thrown out and injured.

Pleas: 1. Not guilty. 2. That defendant was surveyor of highways for the township of Tottington Lower End, and that it then was defendant's duty to repair the highways, and as such surveyor defendant was executing certain necessary repairs upon the highway, and certain parts of the highway were necessarily raised for the purpose of such repairs, and plaintiff by his own negligence drove the carriage against the raised parts of the highway.

Issue joined.

At the trial before Mellor, J., at the Manchester winter assizes, 1872, it appeared that the plaintiff was riding in a dog-cart along a road near Bury, in the township of Tottington Lower End, between 9 and 10 p.m. on the 23rd of May, 1872, when the cart

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was upset owing to the road being left under the circumstances detailed in the judgment.

The jury found that leaving the road in its then state, without a light or warning, was negligence; but that the defendant did not personally interfere in doing the work, or in directing the road to be left as it was.

On these findings a verdict was entered for the plaintiff, with leave to move to enter it for the defendant.

A rule having been obtained accordingly, on the ground that on the facts there was no personal liability shewn in the defendant,

June 3. *R. G. Williams, Q.C.* (*Holker, S.G.*, with him), shewed cause.

Pope, Q.C., and *John Edwards*, in support of the rule.

In addition to the cases mentioned in the judgment, the following cases were cited: *Davis* v. *Curling* (1); *Newton* v. *Ellis* (2); *M'Kinnon* v. *Penson* (3); *Lane* v. *Cotton* (4); *Stone* v. *Cartwright.* (5)

Cur. adv. vult.

July 6. The judgment of the Court (Blackburn, Mellor, and Quain, JJ.), was delivered by

BLACKBURN, J. This was an action tried before Mellor, J., at Manchester. It appeared that the defendant was the surveyor of highways, appointed by the vestry at a salary of 20*l.* a year. By a resolution of the committee of management of the vestry it was ordered that a part of one of the roads, about 150 yards in length, should be raised, and the defendant was ordered to employ men to do it. He accordingly contracted with one John Greenhalgh to do the work at 3½*d.* per yard, the vestry finding materials. John Greenhalgh employed and paid his own men, and proceeded to perform the work accordingly.

At the time of the accident to the plaintiff one half of the road had been raised, and the other half was left temporarily at the old level. The difference in level was about a foot. No fence, or light, or any other protection was put up to warn persons using

(1) 8 Q. B. 286.
(2) 5 E. & B. 115; 24 L. J. (Q.B.) 337.
(3) 9 Ex. 609; 23 L. J. (M.C.) 97.
(4) 12 Mod. 472, 488.
(5) 6 T. R. 411.

the road at night of this difference in level, and the plaintiff driving along fell over with his horse and cart and was injured.

The jury found that the defendant did not personally interfere in doing the work or in directing the road to be left in such condition as it was left. (1)

The verdict was entered for the plaintiff, with leave to move, and a rule was obtained accordingly, on the ground that there was no personal liability on the part of the defendant shewn.

Under the above circumstances we are of opinion that the defendant is not responsible to the plaintiff for the injury caused to him in the manner above mentioned. The defendant, as surveyor of highways, is but the servant of the inhabitants, on whom the obligation to repair the road lies: see *Young* v. *Davis*. (2)

It was not proved that the defendant himself was guilty of any negligent act; and it is clear that John Greenhalgh and his men, who actually did the work, were not the servants of the defendant. As surveyor of highways he employed John Greenhalgh by direction of the committee or vestry, but that does not constitute John Greenhalgh a servant of the defendant, so as to make the defendant responsible for the acts of John Greenhalgh or his men: see *Foreman* v. *Mayor of Canterbury*. (3)

The rule must be made absolute.

Rule absolute.

Attorneys for plaintiff: *Shaw & Tremellen, for P. & J. Watson, Bury.*

Attorneys for defendant: *Clarke, Woodcock, & Ryland, for T. A. & J. Grundy, Manchester.*

(1) The jury found that leaving the road in its then state without a light or warning was negligence; and it was contended for the plaintiff, on the argument of the rule, that, notwithstanding the second finding of the jury that the defendant did not personally interfere, the defendant was liable by reason of s. 56 of 5 & 6 Wm. 4, c. 50, which imposes a penalty on the surveyor who causes any heap of stones or other matter to be laid on a highway and allows it to remain there at night, without proper precautions, to the danger of persons passing thereon; and *Couch* v. *Steel* (3 E. & B. 402; 23 L. J. (Q.B.) 121) and *Atkinson* v. *Newcastle Waterworks Co.* (Law Rep. 6 Ex. 404) were cited, as shewing that, where a duty is imposed under a penalty, a person injured by a breach of the duty can maintain an action. The Court, however, were clearly of opinion that s. 56 did not apply to such a case as the present.

(2) 2 H. & C. 197.

(3) Law Rep. 6 Q. B. 214.

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July 6.

BURNABY *v.* ROBERT EARLE.

Bond, Construction of—"Determination of Cause in favour of Plaintiff"—Notice of Appeal, Effect of, on Judgment—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 37, 38.

Plaintiff having recovered a verdict for 545*l.* in an action against E., proceedings were stayed on E. giving security for the amount, and defendant entered into a bond with a condition that if the determination of the action should be in favour of plaintiff, and E. or defendant should pay the 545*l.*, the bond should be void. A rule was obtained on a point reserved at the trial to set aside the verdict, but was afterwards discharged on the 14th of November, 1870. E. gave notice of appeal under s. 37 of the Common Law Procedure Act, 1854, on the 16th of November, but no bail was put in under s. 38, nor any further steps taken by E. down to April, 1872, when an action was commenced on the bond:—

Held, that the action against E. was determined in favour of the plaintiff: for that notice of appeal, after the time for giving bail on appeal has elapsed without bail being put in, had no effect on the judgment in favour of the plaintiff.

DECLARATION on a bond with a condition that defendant, as one of the obligors, would pay 545*l.* if an action by the plaintiff against Henry Earle were determined in the plaintiff's favour.

Plea, stating certain facts, and that the action remains undetermined in favour of the plaintiff.

Issue joined.

At the trial before Cockburn, C.J., at the sittings in Middlesex, after Hilary Term, 1873, a verdict was directed for the defendant, with leave to move to enter it for the plaintiff, if the Court should be of opinion that the plea was not proved.

A rule having been obtained accordingly,

May 6. *Huddleston, Q.C.*, and *Philbrick, Q.C.*, shewed cause.

Garth, Q.C., and *Pearce*, in support of the rule.

The pleadings, facts, and course of trial fully appear in the judgment of the Court.

The following cases were referred to in the argument: *Hunt* v. *Allgood* (1); *Harrison* v. *Wardle*. (2)

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Blackburn, Lush, and Quain, JJ.) was delivered by

LUSH, J. This was an action on a bond. The bond recited that

(1) 3 F. & F. 155.

(2) 5 B. & Ad. 146.

an action had been commenced in the Court of Exchequer by the present plaintiff against one Henry Earle; that in that action the plaintiff recovered a verdict against Henry Earle for 545*l.* and costs. That afterwards an order was made by Pigott, B., staying the proceedings in the action until the 5th day of the following term, on the defendant giving security for the amount of such verdict to the satisfaction of the master, and that the present bond was entered into for the purpose of giving such security. The condition of the bond was that if the determination of the said action should be in favour of the present plaintiff, and the said defendant Henry Earle and the two sureties (of whom the present defendant, Robert Earle, was one), or one of them, should pay to the plaintiff the sum of 545*l.*, then the obligation should be void.

The declaration, after setting out the bond as above, alleged that a rule was afterwards obtained in the Court of Exchequer calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, which rule was afterwards discharged, and that thereby the said action was determined in favour of the present plaintiff, but that neither the defendant Robert Earle, nor any of the other obligors, have paid to the plaintiff the said sum of 545*l.*, according to the said condition, whereby the bond was forfeited.

To this declaration the defendant pleaded that the rule discharged was a rule on a point reserved at the trial, and that after it was discharged the defendant, Henry Earle, gave notice of appeal according to the 37th section of the Common Law Procedure Act, 1854, and that a case was stated and sent to the plaintiff's attorney, but was never settled or returned, through the fault of the plaintiff, and that the action and appeal were pending and undetermined in favour of the plaintiff at the commencement of this suit.

At the trial of the action before the Lord Chief Justice, it appeared that the rule in the Exchequer was discharged on the 14th of November, 1870, and that on the 16th of the same month a notice of appeal was given according to s. 37 of the Common Law Procedure Act, 1854, but that no bail was put in under s. 38 of the same Act, nor were any further steps whatever taken by the defendant, Henry Earle, to prosecute the appeal down to the 9th of April, 1872, when this action was commenced.

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It was not proved that any case on appeal had been sent to the plaintiff or his attorney, or that the plaintiff or his attorney had impeded the prosecution of the appeal in any way.

On this evidence the verdict was entered for the defendant on the plea, and leave was given to the plaintiff to move this Court to enter the verdict for him in case we should be of opinion that the plea was not proved; and a rule having been granted for that purpose, it was argued before us in the last term.

We are of opinion that the substantial averment in the plea was not proved, and that the verdict should be entered for the plaintiff.

The substantial averment in the plea is, that the action was undetermined in favour of the plaintiff at the commencement of the suit, and that averment in our opinion was not proved, unless the fact that a notice of appeal was duly given under s. 37, without more, proves it.

We are of opinion that after the time for putting in bail, under s. 38, has elapsed, no bail having been put in, a notice given under s. 37 has no effect on the judgment or execution; and that the judgment in favour of the plaintiff in this case has therefore the same force and effect as if no such notice had been given.

The proceedings on appeal under the Common Law Procedure Act, 1854, are similar to those in error under the Common Law Procedure Act, 1852. At common law the suing out of a writ of error was a supersedeas of execution on the judgment, but did not affect the judgment in any other way. Hence, it was held, that the pendency of proceedings in error was no answer to an action on the judgment, though in general the Courts were in the habit of staying the second action pending such proceedings, where bail in error had been given: see *Snook* v. *Mattock* (1); *Doe* v. *Wright*. (2) Afterwards, various statutes were passed to prevent a writ of error operating as a supersedeas of execution unless bail was given; and the practice in this respect is now regulated by ss. 150, 151 of the Common Law Procedure Act, 1852.

As to proceedings on appeal, s. 38 of the Common Law Procedure Act, 1854, enacts: "That notice of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs be given within eight days, in like manner and to the same amount

(1) 5 A. & E. 239. (2) 10 A. & E. 763, 783.

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as bail in error." It is clear, therefore, that after the time for giving bail has elapsed, and no bail has been given, the notice of appeal does not stay execution on the judgment nor affect the judgment in any way.

Such being the practice in error and on appeal, it remains to consider the language of the bond in this case. The words of the condition are, "if the determination of the said action shall be in favour of the plaintiff," &c. We are of opinion that, as there was at the commencement of this action a judgment in favour of the plaintiff, and there was no stay of execution on that judgment, such a state of things amounts to "a determination" of the action in favour of the plaintiff within the meaning of the condition. Had the defendant, by putting in bail or otherwise, obtained a stay of execution on the judgment, we are disposed to think that then, though there would still have been a valid judgment in favour of the plaintiff, there would not have been such a determination of the action in his favour as is contemplated by the condition of this bond. But where, as in this case, the plaintiff has obtained a judgment in his favour, and is in a condition to enforce it by execution, the action, as far as he is concerned, may be properly said to be determined in his favour, and unless the amount mentioned in the condition is paid the bond is forfeited.

For these reasons, we think that the main averment in the plea, namely, "that the said action was undetermined in favour of the plaintiff at the commencement of this suit," was not proved, and the rule obtained to enter a verdict for the plaintiff on that plea must be made absolute.

It was contended by the counsel for the plaintiff that a notice of appeal not followed up by a case did not constitute an appeal under the provisions of the Common Law Procedure Act. We do not think it necessary to decide this point, as we are clearly of opinion that if the notice per se did constitute an appeal, the notice was waived and the appeal abandoned by the unreasonable delay in proceeding upon it.

Rule absolute.

Attorneys for plaintiff: *E. & T. Smith & Sons.*
Attorneys for defendant: *Hughes, Hooker, & Buttanshaw.*

1874
May 30.

ROBERTS, APPELLANT; EGERTON, RESPONDENT.

Adulteration Act (35 & 36 *Vict.* c. 74), s. 2—*Selling as unadulterated an adulterated Article*—"*Green Tea.*"

The appellant, a tea dealer, was convicted under 35 & 36 Vict. c. 74, s. 2, for selling as unadulterated "green tea" which was adulterated. A person asked for two ounces of "green tea" at the appellant's shop, for which he paid 5½*d.*, the shopman stating that he was authorized by his employers to guarantee all their green teas of the value of 3*s.* per pound and upwards as genuine green teas. On analysis, the tea was proved to be painted or faced with gypsum and prussian blue for the purpose of colouring it. The tea was sold in the same state in which it comes from abroad. The tea which is imported from China as green tea, and generally known as such in the tea trade, is painted and faced in this manner; but this practice is not known to the public. Pure green tea, though not known generally in the trade as "green tea," is imported from Japan:—

Held (by Cockburn, C.J., Blackburn and Archibald, JJ., Quain, J., dissenting), that the conviction was right.

CASE stated by justices of Cheshire, under 20 & 21 Vict. c. 43.

The appellant appeared by counsel to an information charging that the appellant, on the 12th of May, 1873, at Birkenhead, did unlawfully sell to one Joseph Millington, as unadulterated, a certain article of food or drink, to wit, two ounces of green tea, which was adulterated, contrary to 35 & 36 Vict. c. 74.

By 35 & 36 Vict. c. 74, s. 2, "Every person who shall sell any article of food or drink, with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug, which is adulterated, shall for every such offence, on a summary conviction of the same before two justices of the peace at petty sessions, in England, . . . forfeit and pay a penalty not exceeding 20*l.*"

The appellant keeps a shop at Birkenhead for the sale of tea and coffee, and on the 12th of May, 1873, Joseph Millington went to the shop. He asked for some green tea, which was served to him by one of the shopmen of the appellant, and he bought two ounces of it, for which he was charged 5½*d.*

Millington informed the shopman, after he had purchased the

tea, and before he left the shop, that he bought it for the purpose of having it analysed by the public analyst; and the shopman then stated that he was authorized by his employers to guarantee all their green teas of the value of 3*s.* per pound and upwards as genuine green teas.

Joseph Millington afterwards delivered the two ounces of green tea in the same state in which he had received it from the shopman of the appellant to the respondent, who is the officer duly authorized under s. 6 of 35 & 36 Vict. c. 74, to submit samples of articles of food or drink to be analysed by the public analyst.

The respondent delivered the same two ounces of green tea to J. C. Brown, the public analyst for the county, in the same state in which he received it from the said Millington, for the purpose of analysis.

On the 20th of May, 1873, the analyst delivered to the respondent a certificate, of which the following are the material parts:—

"County of Chester, No. 66.

"The Acts for preventing the Adulteration of Articles of Food, Drink, and of Drugs (23 & 24 Vict. c. 84, and 35 & 36 Vict. c. 74).

"I hereby certify that for the purposes of the above-named Acts I have analysed a sample of green tea submitted to me for analysis on the 14th May, 1873, by Superintendent Egerton, and marked No. 66. And I further certify that such sample is adulterated by a thick facing of mineral matter and prussian blue."

The tea referred to in the certificate is a portion of the green tea purchased by Millington at the shop of the appellant. It was painted or faced with gypsum and prussian blue for the purpose of colouring it, and this is the adulteration mentioned in the certificate.

The green tea in question was sold by the appellant in the same state in which it came from abroad, and the appellant did not in any way cause the tea to be painted or faced in this country.

A sample of tea was produced by the public analyst before the justices, which resembled in colour and appearance what is

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popularly known as green tea. This was proved by the public analyst to be neither painted nor faced. He also proved that he had analysed other samples of tea resembling in colour and appearance green tea, and that they contained no colouring matter. It was also proved that the tea which is imported from China as green tea, and generally known as such in the tea trade, is painted and faced in the manner and for the purposes above described; and that the sample of tea, produced before the justices and proved by the public analyst to be neither painted nor faced, was imported from Japan, and not known generally in the trade as green tea.

It was contended on behalf of the appellant: 1. That the merchantable article imported into this country, known by the name of green tea in the tea trade, is a painted or faced tea, and that it is not a natural simple production of nature; and that, therefore, a vendor of green tea cannot be taken to represent that he sells only the leaves of the tea plant, unaffected by any process. 2. That green tea was sold in the state in which it was imported from China, and that the painting or facing was done there, and not in this country. 3. That painting or facing tea for the purpose of colouring it is not an adulteration within the meaning of 35 & 36 Vict. c. 74, and is not done for the purpose of increasing its weight or bulk.

The justices were of opinion that, as the practice of painting and facing tea sold as green tea, though known to those engaged in the tea trade, is not known to the public, the sale to Millington, when he asked for green tea, of tea painted and faced under the circumstances of this case, was a sale as unadulterated of an article of food or drink which was adulterated, within the meaning of 35 & 36 Vict. c. 74; and they convicted the appellant.

The question for the opinion of the Court is whether the appellant was legally and properly convicted of the offence charged in the information.

C. Russell, Q.C. (with him *Segar*), for the appellant. Since the case of *Fitzpatrick* v. *Kelly* (1) it must be conceded that knowledge on the part of the seller that an article is adulterated is not necessary under the second clause in s. 2 of 35 & 36 Vict. c. 74.

(1) Law Rep. 8 Q. B. 337.

But it is necessary that he should sell it as unadulterated. The appellant's shopman was asked for green tea, and he sold what is universally known as green tea.

[COCKBURN, C.J. Surely, "green tea" is only the leaf as gathered and dried.]

It is found in the case that the green tea of commerce is always faced and painted in this way.

[BLACKBURN, J. That might be an answer if the sale had been between tea dealers, but this was a sale to one of the public who know nothing of this.]

That fact is not found directly in the case. Moreover, taking s. 2 with the definition in s. 3, it would seem that the admixture in order to be an adulteration must either be the addition of something injurious to health, or of something to increase the bulk. Neither of these is found in the present case.

[BLACKBURN, J. Nor is either necessary under the second part of s. 2.]

If the appellant was rightly convicted in this case, every wine merchant, even if he sell sherry exactly as he imported it, will be liable to conviction, for all sherry is alcoholised, or fortified, as it is called, with spirit.

Poland, for the respondent. The case finds that there is genuine green tea, that is, tea of a green colour without any foreign admixture, and it follows as a necessary consequence that the tea in question was adulterated. And this at once distinguishes the case of sherry; for there is no such thing as sherry without alcohol imported. This addition of spirit is necessary to its keeping. And, if the article is adulterated, unless the purchaser knows that he is purchasing an adulterated article, the offence is committed; and here the case sufficiently negatives any such knowledge. The tradesman is bound, under the penalties in the statute, to find out whether the articles which he sells are adulterated or not, and he sells them at his peril, if he does not ascertain this and act accordingly. In the present case, moreover, as the adulteration is known in the trade, the appellant must have known that this was tea faced with gypsum and prussian blue. Sect. 3, whatever it means, does not purport to give a definition of adulter-

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ation, it only makes that adulteration which might not otherwise have been considered to be adulteration.

C. Russell, Q.C., in reply.

COCKBURN, C.J. I am of opinion that this conviction ought to be affirmed, and I am of this opinion notwithstanding my Brother Quain hesitates. By s. 2. of the statute, so far as it applies to the present case, it is made an offence to sell as unadulterated any article of food or drink which is adulterated. The first question is, is what the appellant sold an adulterated article? I think that it is. The case finds that green tea, though not yet known as such in the market, is imported from Japan, which is without the plastering and painting introduced by the Chinese. There is, therefore, genuine unadulterated green tea to be had. But then it is stated in the case that it is known in the trade, that is, by wholesale and retail dealers in tea, that the green tea from China does always undergo this process of painting and facing; but it is also found inferentially in the case that this is not known to the public or consumers in general. It follows, therefore, that the green tea sold by the appellant was adulterated. It is clear, moreover, that it was sold as unadulterated, for it was stated by the shopman that all green teas above a certain value were warranted genuine green teas. It is argued that the statement in the case must mean that this was a genuine article of commerce; and, if it had been found that the public generally knew what process green tea underwent, that might be so; but it must be taken on the case that the consumer knows nothing about this. He goes to a shop thinking to get a genuine unadulterated article, which it appears he might get. There is no necessity for knowledge on the part of the seller, where the article sold is adulterated, but not so as to be injurious to health, there being in this respect a distinction between the first and second clauses of the 2nd section; but assuming the seller would not be liable in the absence of knowledge on his part, I think we must take it that the adulteration was known to the appellant. It is true he sold the tea in the state in which it came from abroad; but he is in the trade and must be taken to have a competent knowledge of

his business, and it is found that in the trade the fact of Chinese tea being adulterated is known. Therefore I do not think the appellant could set up that he was ignorant that the tea was adulterated. On the whole, therefore, I am of opinion that this tea was adulterated, and not the genuine article which the public have a right to expect when they buy green tea. I am very much disposed to think that if the public were told that in drinking green tea they were drinking a decoction of gypsum and Prussian blue, they would take to black tea instead. The conviction must be affirmed.

BLACKBURN, J. I am of the same opinion. The Act is very oddly and obscurely worded; but there seems no great difficulty in ascertaining its meaning, as far as the present case is concerned. By s. 1, heavy penalties are imposed on persons adulterating articles of food and drink, or drugs; s. 2 applies to the sale of articles adulterated. The first clause makes it an offence to sell anything so adulterated as to be injurious to health, whether the seller declares that it is adulterated or not, provided he knows it is so adulterated. The second clause plainly means, that if you sell an adulterated article as unadulterated, you shall be liable to a penalty, whether it be injurious to health or not, and whether you know of the adulteration or not. Sect. 3 is more obscurely worded, but it seems to mean that any admixture of foreign matter with the fraudulent intent of increasing the bulk of the article shall be taken to be adulteration, unless the seller at the time of the sale declare the admixture. But, at all events, the section gives no definition of adulteration, and therefore it may be dismissed in considering the present case. The second clause of s. 2, is what applies to the present case, and two points arise upon it. First, was the tea sold by the appellant an adulterated article? secondly, did the appellant sell it as unadulterated? Now, green tea I take to be the tender leaf of the plant, simply dried in a particular way and rolled up, without more. However, in China, and probably elsewhere, tea with a facing of gypsum and prussian blue is substituted for pure tea. We must take it for the purposes of the case, though I doubt the fact very much myself, that all

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green tea imported from China is of this description. Specimens of green tea were however produced, which are free from this process, though said not to be known in the trade as green tea; and there can be no doubt that there is plenty of pure green tea to be had. It was argued that the tea was sold as imported, and that on asking for green tea a person must be taken to be asking for that which is known in the trade as green tea. But this was not a sale of green tea in the trade; and the case finds, by way of recital, but sufficiently for the purpose, that the practice of facing and painting tea sold as green tea is not known to the public. When the article must be compounded of different things, or some foreign ingredient is necessarily and universally mixed with it in order to preserve it, as for instance, sherry, which requires the addition of alcohol to make it keep, there the article thus mixed and known to be mixed cannot be said to be adulterated. But when a simple article like tea has foreign ingredients added to it, like gypsum and Prussian blue, which are not required for the process of preparing and drying it, but are added for the purpose of making it look green, that is adulteration. Secondly, did the appellant sell this as unadulterated? He sold as green tea that which he knew, and the public did not know, to be merely inferior tea faced and coloured; and, moreover, the shopman said that he was authorized by his employers to guarantee all their green teas above a certain value as genuine. On these facts, therefore, I am of opinion that the appellant was rightly convicted of selling as unadulterated an adulterated article.

QUAIN, J. I regret that I cannot agree with the judgment of the other members of the Court; but on the facts of this case I am of opinion that the appellant was not proved to have been guilty of the offence charged under s. 2 of this Act. I cannot agree that a retail grocer selling tea just as it was imported from China is brought within the purview of the Act merely because the public are not aware that green tea, as it is known to the trade, is painted and faced in the manner stated. I understand the statement in the case as amounting to a statement, that practi-

cally and for the purposes of trade there is no other green tea than such as the appellant sold. The green tea imported from Japan is not the green tea of commerce. The appellant sold the well-known article of commerce just as it was imported, and in my opinion, therefore, he cannot be said to have sold as unadulterated an adulterated article.

ARCHIBALD, J. I agree with my Lord and my Brother Blackburn that the conviction was right. The offence with which the appellant was charged is created by the latter part of s. 2, under which knowledge is immaterial. The question, therefore, is, whether the appellant sold as unadulterated an article which was in point of fact adulterated. A description of a particular article may become generally known as applying to an adulterated article; but though "green tea" may be known in the trade, and therefore to the appellant, as tea with something else added to it, I do not agree that it is found in the present case that this process of facing and colouring is generally known to the public; so that when a purchaser asks for "green tea" he does not mean to ask for this adulterated article, but expects to have pure green tea. If, again, this admixture were essential to the manufacture of the article, that might prevent the article from being an adulteration; but that, again, is negatived in this case, for pure green tea may be obtained.

Judgment for the respondent.

Attorney for appellant: *W. Hunter New.*
Attorneys for respondent: *Purkis & Perry.*

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June 3.

CUTLER, APPELLANT; TURNER AND ANOTHER, RESPONDENTS.

Master and Servant—Master and Servant Act, 1867 (30 & 31 *Vict. c.* 141), *s.* 9—*Absenting from Service—Second Offence.*

The appellant, in 1871, agreed to serve the respondents as a fire-iron forger for five years. On the 1st of April, 1873, he was summoned under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), for absenting himself from the respondents' service, and was, on the 13th of May, ordered to pay 11*l.* 8*s.* to them as compensation for the breach of contract, which sum was paid. Not having returned to his employment, the appellant was again summoned and, on the 7th of July, ordered to fulfil his contract and to give security for its fulfilment, and in default to be imprisoned for a term not exceeding three months. The appellant did not comply with the order and underwent three months imprisonment. On his liberation he continued to absent himself, and was again summoned for absenting himself from the respondents' service, and ordered, on the 18th of November, to pay 11*l.* 14*s.* to them as compensation :—

Held, that, upon the true construction of s. 9 of the Act, the orders of the 13th of May and the 7th of July did not annul the contract of service, and were no bar to the subsequent summons and order of the 18th of November; and that that order was rightly made.

CASE stated by the stipendiary magistrate for the borough of Sheffield, under 20 & 21 Vict. c. 43.

A summons dated the 28th of October, 1873, under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), came on for hearing before the magistrate on the 31st of October, and again by adjournment on the 18th of November. The summons recited that a complaint had been laid before the magistrate, that the appellant (thereinafter called the employed) being the servant as a fire-iron forger of the respondents (thereinafter called the employers), in their trade or business of fender and fire-iron manufacturers, under a certain contract of service for a period then unexpired, did, on the 7th of October, 1873, and still did, absent himself from the service of the employers without just cause or lawful cause, and the employers claimed, for the breach and non-performance of the contract, that the employed might be directed to fulfil the contract, and prayed that the employed might be summoned and adjudicated upon under s. 9 of the Master and Servant Act, 1867 (30 & 31 Vict. c. 141.)

On the 18th of November the magistrate made an order direct-

ing the appellant to pay to the respondents the sum of 11*l.* 14*s.* as compensation to the respondents, being of opinion, under the circumstances hereinafter stated, that an order to fulfil the contract as prayed in the summons was not the most appropriate remedy, and an adjournment having been previously granted on the application of the appellant's attorney, to meet the question of compensation. The order was drawn up, directing that the sum of 11*l.* 14*s.* should be paid by the employed to the employers as and for compensation to them for the breach and non-performance of the contract; and that the employed should pay to the employers the sum of 6*s.* for their costs.

The facts were as follows:—

On the 25th of February, 1871, the parties made the following agreement in writing:—"An agreement made between Thomas Hayne and William Turner of the one part, and William Cutler of the other part, whereby it is mutually agreed between the parties as follows: 1. W. Cutler agrees to work for Thomas Hayne and William Turner as a fire-iron forger for the term of five years from the date hereof, during which term he will complete and finish in a workmanlike manner for the respondents all such work as shall be assigned to him by them. 2. That he will not, during the term, work for any other employer than Thomas Hayne and William Turner. 3. Thomas Hayne and William Turner agree to employ and provide work by the piece for W. Cutler during the whole of the said term of five years, paying him weekly for such work as he shall complete and finish for them the usual prices allowed by those in the same trade for similar work."

The appellant entered into the service of the respondents under the agreement.

On the 8th of February the following notice, given on behalf of the appellant, was received by the respondents.

"I hereby respectfully give you notice that on and after March the 8th, 1873, the prices of work done by me in your employment will be increased by 20 per cent. (the same as given in Birmingham), and in case of non-compliance with the same, shall feel compelled to suspend myself from your service from that date until the same is conceded."

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On the 1st of March, 1873, the appellant ceased to work for and absented himself from the service of the respondents; and on the 1st of April, 1873, they took out a summons under the Master and Servant Act, 1867, against the appellant for absenting himself from the service of his employers without lawful excuse, and declared that the amount of compensation which they claimed for the breach or non-performance of the contract was 15*l.* 12*s.*, and prayed that the appellant might be adjudicated upon under s. 9 of the Act.

The case was heard on the 13th of May, 1873, when the parties appeared in person, and the magistrate being of opinion that the appellant had wrongly absented himself, and also that the respondents had sustained damage by reason of such absence between the 1st of March and the issuing of the summons, to the amount of 11*l.* 8*s.*, ordered the appellant to pay that sum, together with the costs of the summons and order, at the same time expressing his opinion that the contract was still in force; and the magistrate assumed that the appellant, after hearing his decision, would return to his employment and fulfil the contract for the remainder of the term. The damages were assessed on the following principle: the defendant could make, if at work, twenty-four sets of fire-irons every week, and the net profit of the respondents was 3*s.* 3*d.* per set, equal to 3*l.* 18*s.* per week.

The order not having been complied with, an order for imprisonment was drawn up, but the amount was paid on behalf of the appellant before his actual imprisonment.

The appellant did not return to his work, and on the 6th of June, 1873, another summons was issued against the appellant for absenting himself from the service of his employers, and the respondents claimed for the breach of the contract that the appellant might be directed to fulfil the contract, and prayed that he might be adjudicated upon under s. 9 of the Master and Servant Act, 1867.

The summons was heard on the 7th of July, 1873, and it was ordered that the employed "shall fulfil the contract forthwith, and that he shall forthwith find good and sufficient security by recognizance, himself in the sum of 50*l.*, and two sureties in the sum of 25*l.* for the due fulfilment of the contract, and that he

shall pay to his employers 15*s.* 6*d.* costs, and in default of finding such good and sufficient security, that the employed be committed to the house of correction at Wakefield, there to be confined and kept until he should find security, but so, nevertheless, that the term of imprisonment do not exceed in the whole three calendar months."

The order was not complied with, and the appellant underwent the three months imprisonment in default; and on his liberation he continued to absent himself from his employment. The summons of the 28th of October was thereupon taken out, and the order, the subject of this appeal, was made as upon consideration, after objection taken and reference to the cases of *Unwin* v. *Clarke* (1), *Crane* v. *Powell* (2), and *Barnsley* v. *Taylor* (3), the magistrate was of opinion that neither of the previous orders was a bar to the last summons and order.

The damages in the last-mentioned order were purposely limited by the respondents to those that accrued by the breach between the period of the appellant's liberation from prison and the issuing of the last summons, being three weeks' net profit on the appellant's labour at 3*l.* 18*s.* a week. The magistrate was of opinion,—as it appeared before him on the last case, and was avowed by the appellant's attorney, that the appellant was acting wilfully, in the sense of acting under the direction or by the advice of his trade union, and that he did not intend to perform the contract at all,—that whatever damages were claimed and ordered to be paid under the last summons, must be taken as in final satisfaction of the contract, as the respondents could not, under those circumstances, bring an unlimited number of complaints.

The question for the opinion of the Court was, whether the orders of the 13th of May and the 7th of July, 1873, or either of them, were a bar to the subsequent complaint and summons of the 28th of October, 1873, and the order thereon.

Hopwood, Q.C. (with him *Forbes*), for the appellant, contended that, owing to the conviction and imprisonment suffered by the appellant under the order of the 7th of July, the contract of

(1) Law Rep. 1 Q. B. 417. (2) Law Rep. 4 C. P. 123.
(3) 37 L. J. (Q.B.) 39.

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service was annulled, and that the subsequent order of the 18th of November was therefore invalid.

Dodd, for the respondents, was not heard.

LUSH, J. I am of opinion that the order of the magistrate of the 18th of November, is right. The question put to us is whether the orders of the 13th of May and 7th of July, or either of them, were a bar to the subsequent summons of the 28th of October and the order of the 18th of November made on that summons. The order of the 13th of May directed the appellant to pay 11*l.* 8*s.* as compensation to the respondents, and the order of the 7th of July directed the appellant to fulfil his contract and to find security for its due fulfilment. The question for us now is whether those two orders put an end to the contract, so that the appellant could not be again charged for absenting himself. Looking at the language of the statute, I am of opinion that it was not contemplated by the legislature that such orders should make a termination of the contract of service. Sect. 4 enacts that whenever the employed shall absent himself from his service the party aggrieved may lay an information or complaint before a justice setting forth the grounds of complaint and the amount of compensation claimed for the breach or non-performance of such contract, and the justice shall issue a summons requiring the employed to appear before two justices. Then s. 9 states what is to be done on the hearing of the complaint. The justices may, by an order in writing, either make an abatement of the whole or part of any wages then already due to the employed, or shall direct a fulfilment of the contract of service, with a direction to the party complained against to find forthwith good and sufficient security for the fulfilment of such contract; or else shall annul the contract, discharging the parties from the same, and apportioning the amount of wages due up to the completed period of such contract; or else where no amount of compensation or damage can be assessed, or where pecuniary compensation will not, in the opinion of the justices, meet the circumstances of the case, impose a fine upon the party complained against not exceeding in amount the sum of 20*l.*; or else shall assess the amount of compensation, together with the costs, to be made to the party complaining, inclusive of

the amount of any wages abated, and direct the same to be paid. Up to this point it is not stated what is to be the consequence of the breach of the order. Then the section goes on: "If the order shall direct the fulfilment of the contract, and direct the party complained against to find good and sufficient security, and the party complained against neglect or refuse to comply with such order, a justice may, if he think fit, by warrant under his hand, commit such party to the common gaol or house of correction within his jurisdiction, there to be confined and kept until he shall so find surety; but nevertheless so that the term of imprisonment, whether under one or several successive committals, shall not exceed in the whole the period of three months: provided always that the two justices may, if they think fit, assess and determine the amount of compensation or damage to be paid to the party complaining, and direct the same to be paid whether the contract is ordered by them to be annulled or not; or, in addition to the annulling of the contract of service and discharge of the parties from the same may, if they think fit, impose a fine. . . ." The language of the latter part of the section shews two things: first, that the order should not put an end to the contract of service; secondly, that the imprisonment is for not finding security for the fulfilment of the contract. So that if the employed has been ordered to find security, and in default of doing so has been imprisoned for a month, if he again commits default he may be imprisoned again, but the whole term of imprisonment is not to exceed three months; but that is for not finding securities for the fulfilment of the contract. Then comes the proviso, which shews that nothing short of an order annulling the contract will put an end to it. The language of the proviso is altogether inconsistent with the notion that imprisonment or payment of compensation should of itself annul the contract: and if the contract is not annulled, the parties breaking it may be proceeded against toties quoties. Where a magistrate has imprisoned the employed for three months for not finding security, he has exhausted his power to imprison him for not fulfilling the contract or finding security, but he may still make an order for the payment of compensation for a breach of contract. Then the remedy for the non-payment of compensation is given by s. 11:

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"Where on the hearing of an information or complaint an order is made for the payment of money, and the same is not paid as directed, the same shall be recovered by distress of the goods and chattels of the party failing to pay, and in default thereof by imprisonment of such party according and subject to the Acts described in the 2nd schedule to this Act: but no such imprisonment shall be for more than three months or be with hard labour." And s. 12 says that, "from and after the expiration of the term of any such imprisonment as aforesaid, the amount of fine, compensation or damages, together with the costs so assessed and directed to be paid by any such order as aforesaid shall be deemed and considered as liquidated and discharged, and such order shall be annulled accordingly and the parties exonerated from their respective obligations under the same." I think that makes the whole statute consistent. The contract continues in force until the justices think fit to make an order to annul it. I therefore think that the order in question was good.

ARCHIBALD, J. I am also of opinion that the order of the magistrate made on the 18th of November should be affirmed, and that the remedy was not barred by either or both of the previous orders. Sect. 9 of 30 & 31 Vict. c. 141, gives justices the power to annul the contract or to direct that the contract should be fulfilled, and to order the employed to find security for its fulfilment; and it gives a power to enforce that order by imprisonment, so that the committal does not in the whole exceed a period of three months. It has been said that the suffering of the imprisonment for three months by implication puts an end to the contract of service; but that seems to me to be altogether at variance with the intention of the legislature as here expressed. A severe remedy by imprisonment is given in order to enable the parties to enforce the contract; but because the party is not compelled by application of that punishment to fulfil the contract, it does not follow that the contract is annulled. There might be a longer time to serve, for which the master would be entitled to compensation, and that contract is not put an end to by implication. I think that, notwithstanding that the power to enforce the contract by imprisonment has been exercised, there is still power to award

compensation, and if compensation is awarded the remedy to enforce payment is given by s. 11. I think, therefore, that the contract of service was not put an end to, and that the conviction is right.

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Judgment for the respondents.

Attorneys for appellant: *Doyle & Edwards.*
Attorneys for respondents: *Rickards & Walker.*

MARWICK, APPELLANT; CODLIN, RESPONDENT.

July 6.

Beerhouse—Public-house—New Licence—Confirmation of Licence by Licensing Committee—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 37, 74.

By s. 37 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), a new licence shall not be valid unless confirmed by the licensing committee.

By s. 74 a new licence means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors:—

Held, that a licence to sell exciseable liquors under 9 Geo. 4, c. 61, and the Licensing Act, 1872, upon premises theretofore licensed for the sale of wine and beer only, is a new licence within the above sections, and requires confirmation by the licensing committee.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

The respondent was charged with having on the 17th of May, 1873, within the metropolitan police district, unlawfully sold and exposed for sale certain intoxicating liquors, to wit, spirits, without being duly licensed to sell the same, contrary to s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

The respondent was the occupier of the houses numbered 4 and 5, Crown Court, Pall Mall, in the county of Middlesex, and up to the general annual licensing meeting held for the St. James's division in the county, in March, 1873, he held licences granted by the Commissioners of Excise for the sale only of wine and beer for consumption on the premises. Such licences were granted to him under the authority of the justices' certificate, which had been granted to him annually since the passing of the Wine and Beer-house Act, 1869 (32 & 33 Vict. c. 27), and at the general annual licensing meeting such certificate was renewed.

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At the last general and annual licensing meeting the respondent, for the first time, applied for a victualler's or publican's licence under 9 Geo. 4, c. 61, and the Licensing Act, 1872, and he gave the notices required to be given by persons applying for a new licence under s. 40 of the Act, and in accordance with the rules of the licensing justices he presented a petition in favour of such application.

The appellant, who is a licensed victualler, and has carried on that business for many years at a house in Crown Court, Pall Mall, within half a dozen yards of the respondent's house, presented a petition against the grant of such licence to the respondent under 9 Geo. 4, c. 61, and the Licensing Act, 1872.

The form of this licence was settled by the secretary of state under s. 48 of the Licensing Act, 1872, and it contains on the back of it a form to be filled up by the confirming authorities for the county of Middlesex.

The confirming authority for the county, consisting of the assistant judge and eleven other magistrates of the county, held a meeting on the 21st of April, 1873, for the purpose of confirming the new licences granted by the justices of the county at the various general annual licensing meetings, under the Licensing Act, 1872.

At that meeting the appellant claimed, under s. 43, to be heard to shew cause why such licence should not be confirmed, and it was contended by the respondent that such licence did not require confirmation, on the ground that it was not a new licence within the meaning of the Act.

The confirming authority determined that the licence granted to the respondent was not a new licence within the meaning of the Licensing Act, 1872, but suggested that if either party felt aggrieved application might be made for a mandamus to compel them to hear the case on the merits, so that the point of law might be determined by the Court of Queen's Bench.

The respondent did not adopt this course, but at once obtained from the Commissioners of Excise a licence authorizing him to retail spirits.

The appellant thereupon gave the respondent notice that the victualler's or publican's licence so granted to him was null and

void, because it had not been confirmed, and that the excise licences granted under it were also null and void.

Such notice was disregarded, and the respondent did, in fact, sell by retail and expose for sale, the spirits in his house on the day mentioned in the summons, and the appellant then obtained a summons from the magistrate against the respondent to answer the charge before mentioned.

On the hearing of the summons the above facts were proved before the magistrate, and the certificates and licences mentioned were put in evidence.

It was contended, on behalf of the appellant, that the victualler's or publican's licence granted for the first time at the general annual licensing meeting, holden in March, 1873, was null and void because it had not been confirmed as required by s. 37 of the Licensing Act, 1872 (1), and that the Excise licence for the sale of spirits, granted in pursuance thereof, was also null and void by reason of 9 Geo. 4, c. 61, s. 17, and that, in truth and in fact, the victualler's or publican's licence was a new licence as the respondent had no such licence before that time, and he further contended that such grant could not be considered as a grant "by way of renewal."

On behalf of the respondent it was contended, that although he had no victualler's or publican's licence, or a licence authorizing him to sell spirits before such last-mentioned meeting, yet as he had a magistrate's certificate and excise licences authorizing him to sell wine and beer, such victualler's or publican's licence was not a new licence as defined by s. 74 of the Licensing Act, 1872. (1)

The magistrate was of opinion that the victualler's or publican's

(1) 35 & 36 Vict. c. 94, s. 37. "In counties a grant of a new licence shall not be valid unless it is confirmed by a standing committee of the county justices in this Act called the licensing committee."

Sect. 74. "In this Act, if not inconsistent with the context, the following expressions have the meanings hereinafter respectively assigned to them, that is to say, . . . 'Intoxicating liquor' means spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a licence from the Commissioners of Inland Revenue. . . . 'A new licence' means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors: 'The renewal of a licence' means a licence granted at a general annual licensing meeting by way of renewal."

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licence was not a new licence within the meaning of the section referred to, because it was not "a licence granted at the general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors," as there had been both a wine and beer licence granted in respect of those premises for the sale of some intoxicating liquours, namely, beer and wine, and that, therefore, the victualler's or publican's licence authorizing the respondent to obtain a spirit licence was not a new licence within the meaning of that Act; he therefore held, that the licences held by the respondent were valid licences, and dismissed the summons.

The question for the opinion of the Court was, whether the magistrate was wrong in point of law in holding that the victualler's or publican's licence referred to was valid, although it had not been confirmed by the confirming authority.

April 25. *Poland* for the appellant.

Warner Sleigh for the respondent.

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., and Quain, J.) was delivered by

COCKBURN, C.J. This was an appeal against the decision of one of the metropolitan police magistrates, dismissing a complaint against the respondent for selling spirits without a licence contrary to the 3rd section of the Licensing Act, 1872.

The point raised for our decision is, whether the licence granted to the respondent under 9 Geo. 4, c. 61, and the Licensing Act, 1872, for the sale of spirits, &c., for the first time at the licensing meeting in March, 1873, was a new licence requiring the confirmation of the licensing committee under s. 37 of the Licensing Act, 1872. It was contended for the respondent that it was not a new licence, because he held at that time a certificate and licence under the Wine and Beerhouse Acts, 1869 and 1870, for the sale of wine and beer to be consumed on the premises. In support of this contention reliance was chiefly placed on the definition of a new licence in s. 74 of the Licensing Act, 1872. That section enacts that, if not inconsistent with the context, the following expressions have the meanings thereinafter respectively

assigned to them, and amongst others, "new licence means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors," and by the same section intoxicating liquors include beer and wine as well as spirits.

Before the passing of the Wine and Beerhouse Act, 1869, (32 & 33 Vict. c. 27), a broad distinction existed between beerhouses and public-houses commonly so called. The latter were licensed by the justices under 9 Geo. 4, c. 61, the former were licensed by the commissioners of excise without the intervention of the justices. Wine licences to sell wine by retail to be consumed on the premises were also granted by the excise authorities, under 23 Vict. c. 27, to refreshment-house keepers and others, but the justices might object to the granting or renewal of such licences. The Wine and Beerhouse Act, 1869, was the first Act which brought the granting of beer and wine licences directly under the control of the justices. By the 4th section of that Act it is enacted "that no licence for the sale of beer or wine by retail be granted except in pursuance of a certificate of the justices granted under that Act." These certificates are to be granted by the justices at the annual licensing meetings held under 9 Geo. 4, c. 61, and on the same terms and in the same manner as licences under that Act, subject to certain exceptions in favour of licences existing on the 1st of May, 1869, and some other exceptions contained in the Act. But notwithstanding this Act, and the amended Act of 1870, the licences to sell beer and wine only are kept quite distinct from a licence to sell exciseable liquors under 9 Geo. 4, c. 61, nor are there any privileges granted to the holders of the former licences on applying for a licence under the latter Act. The Licensing Act, 1872, introduces a distinction between applications for a new licence and applications to renew an old one; a distinction which seems also made or intended to be made in the Wine and Beerhouse Act, 1869. New licences must be confirmed by the licensing committee appointed under s. 37 of the Licensing Act, 1872, and s. 40 prescribes the form of notice to be given in the case of a new licence; and s. 43 contains certain provisions applicable to a person applying for a renewal of his licence, and apparently facilitates the renewal of licences as distinguished from

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the granting of new licences. It also provides by s. 48, subs. 2, that a renewal of a licence may be made by an indorsement on the licence or by the issue of a copy of the old licence.

In the present case an attempt has been made to transform a beerhouse into a public-house without the sanction of the licensing committee appointed under s. 37 of the Licensing Act, 1872. We think that this cannot be done. The licence granted to the respondent was a licence under 9 Geo. 4, c. 61, and the Licensing Act, 1872, for the sale of intoxicating liquors generally, as defined in s. 74, including spirits as well as beer and wine. This is either a new licence or a renewal of an old one. It is plainly not the latter. A renewal of a licence is a repetition of an old one, and cannot include anything not contained in the old one. The old licence held by the respondent was for the sale of beer and wine only. The new one includes spirits and other intoxicating liquors. The form of renewal as prescribed by s. 48, already cited, seems quite conclusive on this point.

We are of opinion, therefore, that the licence granted to the respondent is a new licence, and is not valid unless it has been confirmed by the licensing committee appointed under s. 37.

With regard to the definition of a new licence contained in s. 74, we think it must either be read as if the words were "a licence granted in respect of premises not theretofore licensed for the sale of intoxicating liquors" of the same kind to which the new licence extends, or the meaning assigned to the words "new licence" in s. 74 must be considered as not applicable to the present case, as being "inconsistent with the context" of the Act and with the whole legislation on the subject.

Case remitted to the magistrate accordingly.

Attorneys for appellant: *Pownall, Cross, & Knott.*
Attorneys for respondent: *Pawle & Fearon.*

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May 23.

Vendor and Purchaser—Leaseholds, Sale of—Conditions of Sale—"No Requisition or Inquiry shall be made respecting Lessor's Title."

Certain leasehold premises were put up for sale by auction on the following, amongst other, conditions: "The abstract of title shall commence with an indenture of underlease, dated the 1st of May, 1869, being a lease from W. S. to W. B. S. for a term of fourteen years less two days, from Lady Day, 1869, and it shall form no objection to the title that such indenture is an underlease; and no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease." The defendant having agreed to purchase the premises, discovered that W. S. had previously to the 1st of May, 1869, mortgaged the premises. The defendant objected that the legal estate being outstanding, W. S. had no power to grant the lease of the 1st of May:—

Held, that the defendant was not precluded by the condition from taking the objection; and that he was not bound to complete the purchase.

Interpleader Issue. James Waddell (the trustee of the property of W. B. Seymour, a bankrupt) affirms and Thomas Wolfe denies that a certain sum of 63*l.* paid into court under a judge's order, dated the 2nd of November, 1872, was at the time of the payment into court and now is the property of James Waddell, as such trustee, as against Thomas Wolfe.

At the trial, before Pigott, B., at the sittings at Middlesex after Easter Term, 1873, a verdict was entered for the plaintiff by consent, subject to the opinion of the Court on the following facts, leave being reserved to enter a verdict for the defendant.

On the 1st of May, 1869, W. Seymour demised certain premises, 137½, New Bond Street, to W. B. Seymour for a term of fourteen years wanting two days. On the 7th of June, 1872, W. B. Seymour became bankrupt. On the 29th of June the plaintiff was appointed the trustee of his estate. On the 11th of July the lease (eleven years of which was unexpired), was put up for sale by public auction on the following amongst other conditions of sale:—

"6. The abstract of title shall commence with an indenture of underlease, dated the 1st of May, 1869, being a lease from W. Seymour to W. B. Seymour, the bankrupt, for a term of fourteen years, less two days, from Lady Day, 1869, and it shall form no objection to the title that such indenture is an underlease, and

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no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease, and the production of the last receipt for the rent reserved by the underlease shall be accepted as conclusive evidence of the due observance and performance of all the covenants contained therein up to the time of the completion of the purchase. A copy of the indenture of underlease will be produced at the sale, and may be inspected at the office of the vendor's solicitor for seven days previous thereto. Intending purchasers shall therefore be deemed to have full notice of all the covenants and conditions in such indenture.

"7. The purchaser shall bear the expense of verifying the abstract with the documents of title and all charges incidental thereto, including travelling expenses (if any), and all official or other copies or extracts of proceedings in bankruptcy, and all inquiries and evidences (if any) which may be required by the purchaser for the purpose of verifying the abstract or otherwise in support of vendor's title shall be made, sought for, and obtained at his or her own expense."

"11. If the purchaser shall neglect or fail to comply with the above conditions, his or her deposit money shall be forfeited to the vendor, who shall be at liberty at any time thereafter to sell the premises in any manner he shall think fit; and all loss (if any) occasioned by any subsequent sale, together with all costs and expenses attending or incident to the same, shall immediately thereafter be made good by the defaulter at this sale; and in case of nonpayment thereof, shall be recoverable by the vendor as liquidated damages in an action at law. . ."

The defendant was declared the highest bidder at the sum of 315*l.*, and on the same day he paid the auctioneer a deposit of 63*l.* under the conditions, and signed the memorandum of the contract indorsed on the conditions.

On the 15th of July an abstract of the plaintiff's title was sent to the defendant. It consisted of abstracts of the underlease of the 1st of May, 1869; of an assignment by way of mortgage, dated the 21st of August, 1869, by W. B. Seymour to certain trustees to secure the payment of a composition of 5*s.* to his creditors; and of a deed, dated the 21st of December, 1870, which, after reciting

the indenture of the 1st of May, 1869, the indenture of the 21st of August, 1870, and the payment of the composition of 5*s.*, re-assigned the premises to W. B. Seymour. In the margin of the abstract of the mortgage of the 21st of August it was stated, "The vendor has not this deed in his possession, but has applied for its production," and it appeared that the abstract of the deed of the 21st of August, 1869, was taken from the recital in the deed of the 21st of December, 1870.

On the 26th of July, 1872, the mortgage deed of the 21st of August, 1869, was seen for the first time by the defendant's solicitor; it was in the possession of Messrs. Richardson & Sadler, who were the solicitors of the Standard Benefit Building Society, and by a recital in this deed it appeared that previous to the 1st of May, 1869, W. Seymour had mortgaged his interest in the leasehold premises to the Standard Benefit Building Society.

The purchaser contended that the legal estate being out of W. Seymour he had no power to grant the lease of the 1st of May.

The vendor contended that by the 6th condition of sale the purchaser was precluded from making any requisition or inquiry into the lessor's title.

The purchaser rejoined that he had not made a requisition as to the title of the vendor, but that, having discovered the legal estate to be outstanding, he was not bound by the sixth condition to take a bad title.

On the 19th of August the vendor's solicitors gave the purchaser notice that, if the sale was not completed by the 21st of August, he would exercise the power contained in the 11th condition to rescind the sale, retain the deposit, and re-sell the property. The sale not having been completed on that day, the plaintiff rescinded the sale, claimed the deposit of 63*l.* in the hands of the auctioneer, and re-sold the property at a loss of 150*l.*

A rule was afterwards obtained to enter a verdict for the defendant, on the ground that the defendant was not bound to accept the title to the lease, he having discovered a fatal defect therein from the documents produced to him by the plaintiff, and therefore was entitled to a return of the deposit of 63*l.*

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Edwyn Jones shewed cause. The plaintiff is entitled to the deposit. The defendant's objection cannot prevail, for the plaintiff has protected himself by the 6th condition, and the defendant is precluded from making any inquiry into the lessor's title; he has, in effect, contracted to purchase whatever estate the plaintiff had. *Spratt* v. *Jeffery* (1) is in point. There the defendant agreed to sell to the plaintiff two leases and the goodwill in trade of a house "as he holds the same"; the Court said that the fair and reasonable construction of those words was that the purchaser shall not be at liberty to raise any objection to the lessor's title. The words in the present case are, "no inquiry shall be made respecting the title of the lessor;" the defendant is therefore bound to take the title, and cannot reject the bargain he has made. In *Shepherd* v. *Keatley* (2) the language of the condition was that the vendor should not be obliged to produce the lessor's title, and the construction put upon these words by Lord Lyndhurst was that they meant nothing more than that "there should be no obligation upon the vendor to produce for the satisfaction of the purchaser any evidence of the lessor's title." The present case cannot be distinguished from *Hume* v. *Bentley*. (3) There the vendor stipulated that the lessor's title should not be inquired into, and Parker, V.C., decreed specific performance of the contract, on the ground that inquiry was altogether precluded for every purpose.

[QUAIN, J., referred to *Sellick* v. *Trevor* (4), and *Darlington* v. *Hamilton*. (5)]

Gibbons in support of the rule. The purchaser having discovered the defect in the lessor's title without any requisition on the vendor, he is not bound to accept the lease. This case is almost one of fraud; the vendor's predecessor in title having mortgaged the premises, the vendor has no title whatever, and the purchaser after he has paid the purchase-money might be turned out of possession the next day. If the vendor requires a purchaser to take a bad title he must express his intention in unambiguous language, so that the purchaser may know what he is really buying. *Spratt* v. *Jeffery* (1) seems to have been

(1) 10 B. & C. 249
(2) 1 C. M. & R. 117.
(3) 5 De G. & Sm. 520; 21 L. J. (Ch.) 760.
(4) 11 M. & W. 722.
(5) Kay, 550.

doubted in *Shepherd* v. *Keatley* (1); by this last case the law is clearly established that, notwithstanding the vendor by conditions of sale stipulates that his title shall not be inquired into, if the purchaser aliunde discovers that the title is bad, he is entitled to insist upon the objection.

BLACKBURN, J. I am of opinion that the rule must be made absolute, and that the purchaser has a right to have the deposit returned. The question turns on the construction of the sixth condition of sale. The principle which ought to guide us in construing conditions of sale is very accurately expressed in *Hume* v. *Bentley* (2) by Parker, V.C.: "According to the ordinary rule, a vendor of leasehold property was under an obligation to shew the lessor's title; but there was no doubt that the vendor might stipulate that he should be relieved from that obligation; and in the case of *Shepherd* v. *Keatley* (1) a stipulation of that kind was held not to amount to a stipulation that the purchaser should be obliged to accept the title without objection or inquiry. If the purchaser could shew, by any means in his own power, that the vendor had a defective title, he might do so. There was no doubt, however, that the parties might stipulate beyond that, viz., that the purchaser must accept the title without inquiry or objection; that would be a lawful stipulation, and the Court put such a construction on the contract in *Spratt* v. *Jeffery*." (3) Now the question is, what construction are we to put on the sixth condition? Does it sufficiently appear that the parties have by their agreement stipulated that the title, though bad, shall be accepted without objection, or does it mean that the vendor is merely relieved from answering requisitions on title? In *Hume* v. *Bentley* (4) the words were very strong: "The vendor shall at his own expense deliver to the purchaser a proper abstract of the title; but recitals or statements in deeds or wills dated twenty years ago shall be received as conclusive evidence of the matters or particulars stated therein; and the lessor's title will not be shewn, and shall not be inquired into.", Construing the last sentence of that condition with what went before, it distinctly shewed that the

(1) 1 C. M. & R. 117.
(2) 5 De G. & Sm. at p. 525.
(3) 10 B. & C. 249.
(4) 5 De G. & Sm. 520.

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vendee was precluded from inquiring into the vendor's title, and Parker, V.C., came to a right conclusion. In the present case the words are: "It shall form no objection to the title that such indenture is an underlease, and no requisition or inquiry shall be made respecting the title." If the vendor meant to express that whatever the title was the vendee was bound to accept it, he should havesaid so in clear and unambiguous words. A distinction appears to me to be made in the condition between "objection" to the title and "requisitions" on title. The construction I put upon the condition is, that no objection shall be made to the title that the indenture is an underlease, and that no requisitions on title shall be made. I think the observations of Lord Lyndhurst in *Shepherd* v. *Keatley* (1) apply: "It is frequently a matter of great inconvenience to the lessee to produce evidence of the landlord's title, and from this inconvenience the clause in question protects him." The condition makes a distinction between what shall be an objection to the title and a protection to the vendor from answering requisitions. That being the construction of this condition, and the vendee, having discovered the defect in the title of the vendor, without having made any requisition of the vendor, he is entitled to insist upon the objection. It is clear that the vendor had no title in the premises, and that the purchaser was justified in refusing to accept the lease, and consequently he is entitled to receive the deposit. The rule will therefore be made absolute.

QUAIN, J. I am of the same opinion. The sale is of an underlease of which eleven years are unexpired, and the question turns on the construction of the sixth condition. It is clear, on the authorities, that where the conditions preclude any inquiry into the lessor's title, the conditions must be construed with great strictness, and we must see whether the words are explicit and clear beyond question, so as to give the purchaser the necessary information as to what he is going to buy. The question in this case is, whether the purchaser, under the sixth condition, is precluded from making all inquiries aliunde into the title of the lessor, and whether he has agreed to accept the lessor's title

(1) 1 C. M. & R. at p. 127.

whatever it is. The condition is: "It shall form no objection to the title that such indenture is an underlease, and no requisition or inquiry shall be made respecting the title." That points to the usual requisitions which are made by the purchaser calling on the vendor to give further evidence, produce further deeds or documents. The word "inquiry" there is not used for the purpose of precluding all inquiry aliunde, but is used as a convertible expression with the word "requisition," and does not extend beyond the word "requisition"; and I find in the seventh condition, where the word "inquiry" is again used, that it is used in that sense; because it says, "and all inquiries and evidences, if any, which may be required by the purchaser for the purpose of verifying the abstract shall be made at his expense." The word "inquiry," in the sixth condition, has not so wide a meaning as that word had in the condition in *Hume* v. *Bentley* (1), because the words there were "the lessor's title will not be shewn and shall not be inquired into." Evidently pointing, therefore, to inquiries from all quarters and in all ways; whereas I think, in the present case, the stipulation points to inquiries and requisitions between the vendor and purchaser. The case is not so much like *Hume* v. *Bentley* (1) as *Darlington* v. *Hamilton*. (2) There the words were, "The purchaser shall not require proof or production of the lessor's title, or any title prior to such lease; and if he insist on any evidence in proof of the identity of the premises, or that the covenants in the lease, or any of them, have been duly performed, the same must be had at his own expense." Lord Hatherley, in his judgment says: "In this case the vendor is selling an estate which is included in a former lease with other property, and this fact was not stated in the particulars of sale. Upon the point of notice I have no doubt. It is quite clear, according to the doctrine referred to and confirmed in *Warren* v. *Richardson* (3) and *Shepherd* v. *Keatley* (4), that whatever may be the terms of the condition of sale, if the purchaser obtain information aliunde that the title of the vendor is not clear and distinct, he has a right to insist on the

(1) 5 De G. & Sm. 520; 21 L. J. (Ch.) 760.

(2) Kay, 550, 557.

(3) You. 1,

(4) 1 C. M. & R. 117.

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objection." It seems to me, therefore, that the sixth condition does not preclude all inquiry, because it does not amount to anything like what has been held in several of the cases to amount to an agreement precluding all inquiry from every quarter. The cases are collected in Dart's Vendors and Purchasers, vol. i. p. 137. It is there stated: "An agreement by ordinary vendors to convey 'such title as they have received from A. B.,' and a condition that the purchaser should accept the vendor's title 'without dispute,' or should accept 'such title as the vendor has;' and an agreement that the lessor's title shall 'not be inquired into,' have been held to preclude objections arising on the face of documents procured by the purchaser aliunde." It appears to me that the sixth condition does not come within the rule laid down in that passage on the cases there cited. Where the conditions of sale point to a requisition to produce other deeds or to make further explanations, they do not preclude the vendor taking a valid objection to the title which he has discovered aliunde.

ARCHIBALD, J. I am of the same opinion. The principles which are applicable to conditions of sale are very clear and distinct, and the only difficulty which arises is in their application. There is no doubt that upon the authorities the parties may so contract and so bind themselves by conditions precluding inquiries into the title, as that the purchaser may be bound actually to accept and pay for a bad title. But in order to produce that result, the conditions must be very clear and distinctly worded for that purpose. Now in several of the cases to which reference has been made, the language which has that effect has been pointed out, and the case which has the most bearing on the present question is that of *Hume* v. *Bentley*. (1) At first it seemed a little difficult to see any precise distinction between the language of that case and of the sixth condition, but when we come to consider it a little more maturely, I think there is a very decided difference, and that the language of the condition, on which Parker, V.C., put the construction that it did preclude all inquiry, does differ in substance from the language of the sixth condition. That the title

(1) 5 De G. & Sm. 520; 21 L. J. (Ch.) 760.

shall not be shewn and shall not be inquired into, may very well be understood to mean, that no inquiry shall be made either of the vendor or any other person, and that no inquiry resulting in any discovery of any defect in the title shall be of any avail against a condition of that description. When we look at the sixth condition, the words stand in a different order, and there is a contrast between the word "objection" and the words "requisition or inquiry," and I think the true construction of this sixth condition is, that, as regards requisition or inquiry, no requisition or inquiry in the nature of a requisition—that is requisition upon the vendor—shall be made respecting the title of the lessor; and this does not at all preclude the operation of the other rule, that if the defect of title is discovered without any requisition upon the vendor, the purchaser is entitled to avail himself of it. In this case the defect has been revealed without relying on requisitions, without having the benefit of requisitions on the vendor, and under these circumstances I think the purchaser is not bound to accept the title, and is entitled to a return of the deposit.

Rule absolute.

Attorney for plaintiff: *Kearsey.*
Attorney for defendant: *Braham.*

TOOLE *v.* YOUNG.

May 26.

Copyright—Dramatic Piece—Dramatising a Novel—Representation without Consent of Proprietor—3 & 4 Wm. 4, c. 15, ss. 1 and 2.

H. wrote and published a novel which he afterwards dramatised. He assigned the drama to the plaintiff, but it was never printed, published, or represented upon the stage. G., in ignorance of H.'s drama, also dramatised the novel in a different form, and assigned his drama to the defendant, who represented it on the stage:—

Held, that, A. having published his novel, anyone might dramatise it, and, although the two dramas were founded upon the novel written by H., the representation upon the stage of the drama written by G. was not a representation of the drama written by H.; and that the plaintiff could, therefore, not recover penalties from the defendant under 3 & 4 Wm. 4, c. 15, ss. 1 and 2.

DECLARATION for representing a dramatic piece called 'Shop,' whereof the plaintiff was the proprietor, as the assignee of one

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Hollingshead, the author thereof, without the consent in writing of the plaintiff, contrary to 3 & 4 Wm. 4, c. 15, ss. 2 and 3. (1)

Pleas: 1. Not guilty. 2. That plaintiff was not the proprietor as alleged. 3. That plaintiff was not the assignee of the author. 4. That the piece was not composed by Hollingshead.

Issue joined.

At the trial, before Cockburn, C.J., at the London sittings after Hilary Term, 1873, it was admitted that in April, 1863, one Hollingshead wrote a novel called 'Not Above his Business,' in a publication called 'Good Words.' The novel was of a dramatic character, and within a month or two after it had appeared in 'Good Words' Hollingshead wrote the drama 'Shop,' which was in effect the novel dramatised. The only difference between the two was that in the drama the narrative part of the novel was turned into stage directions, and description of the characters, and of the scenes, furniture, and other matters to be represented on the stage. In January, 1865, Hollingshead assigned the manuscript of the drama 'Shop' to the plaintiff. It was never printed nor published, nor was it ever represented on the stage by either Hollingshead or the plaintiff. In 1869, one Grattan, being ignorant that Hollingshead had put the novel 'Not Above his Business' into the form of a drama, composed a drama called 'Glory,' taking the incidents and dialogue from the novel as published in 'Good Words.' The two dramas were, however, essentially different. Grattan assigned his drama to the defendant, who represented it on the stage in a theatre of which he was the proprietor.

On these facts Cockburn, C.J., nonsuited the plaintiff, with leave to move to enter a verdict for 50*l*.

(1) By 3 & 4 Wm. 4, c. 15, s. 1, "The author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof, or his assignee, or which hereafter shall be composed and not printed or published by the author thereof, or his assignee, or the assignee of such author, shall have, as his own property, the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain and Ireland . . . any such production as aforesaid not printed or published by the author thereof, or his assignee, and shall be deemed and taken to be the proprietor thereof. . . ."

Sect. 2 imposes a penalty upon a person representing any dramatic production without the consent in writing of the author or other proprietor.

A rule was accordingly obtained on the ground that there was an infringement of the plaintiff's right.

Digby Seymour, Q.C., and *Lumley Smith*, shewed cause. The nonsuit is right; the defendant did not represent the plaintiff's drama; he adapted for the stage a novel which was open to all the world. Hollingshead and Grattan drew from a common source the materials used by them in producing their respective dramas, but in no way is Grattan indebted to Hollingshead's drama. The defendant has not represented the production of which another person is the proprietor within the meaning of 3 & 4 Wm. 4, c. 15, s. 1. As soon as a novel is published the author is entitled to prevent the multiplying and distribution of copies without his consent, but his right does not extend beyond this. The law allows the novel to be dramatised by other persons, and the mere fact that the author himself dramatised it subsequently to its publication does not take away the right of other persons to dramatise it in a different shape: *Jefferys* v. *Boosey* (1); *Reade* v. *Conquest* (2); *Reade* v. *Conquest.* (3)

Sir J. B. Karslake, Q.C., and *Lucius Kelly*, in support of the rule. The argument on the other side amounts to this, that the author of a novel cannot, upon subsequently dramatising it, confer upon himself a valid title to his drama. Hollingshead is the author of a dramatic piece composed, but not published, by him, and the defendant has represented a drama which is in law a reproduction of the drama assigned to the plaintiff by Hollingshead; the defendant is therefore liable to the penalties of the Act. The second case of *Reade* v. *Conquest* (3) shews that, although there was no intention to infringe the rights of the plaintiff, the defendant is nevertheless liable. There was a double production by Hollingshead: first, he wrote the novel, then he wrote the drama. The only reason why he cannot be said to be the author of the drama is, that he has taken the drama from his own novel. This appears to be an absurd conclusion. If A. and B. dramatise a novel of a third person, they may be said to draw their productions from a

(1) 4 H. L. C. 815; 24 L. J. (Ex.) 81.

(2) 9 C. B. (N.S.) 755; 30 L. J. (C.P.) 209.

(3) 11 C. B. (N.S.) 479; 31 L. J. (C.P.) 153.

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common source; but in this case Grattan composed his drama of materials furnished by Hollingshead himself. In the first case of *Reade* v. *Conquest* (1), Erle, C.J., in speaking of the right to dramatise novels without the author's consent, said: "Perhaps the only way in which the author of a novel can protect himself from this sort of infringement is by dramatising it himself;" and Wood, V.C., in *Tinsley* v. *Lacy* (2), seems to be of the same opinion. He says: "I suppose if this lady [the author of the novel] wished to protect herself in the matter as the law now stands, all she would have to do would be to take a pair of scissors and cut out certain scenes, and publish a little drama of her own, because if she first published a work like this in the shape of a drama, she would come within the protection of the Dramatic Author's Copyright Act." These are strong dicta to shew that where the author himself dramatises his novel he is entitled to the protection of the Act against any other attempt to dramatise the novel.

COCKBURN, C.J. I am of opinion that this rule must be discharged. The question turns upon the construction of 3 & 4 Wm. 4, c. 15, an Act for the protection of literary compositions.

The facts of the case are, that Mr. Hollingshead wrote a story, which he published in a work called 'Good Words;' and having in his mind, at the time he wrote and published it, the intention of afterwards dramatising the story, he composed it very much of a dramatic character. After the story had been published and given to the world, Mr. Hollingshead did dramatise it. The drama resembled the story, but was fuller in its incidents. He then assigned the drama to the plaintiff; but it was never published and never represented on the stage. It was kept by the plaintiff with the view of putting it on the stage when a convenient opportunity should offer. In the meantime Mr. Grattan, having read the story and seeing in it the elements of a popular drama, dramatised it; he thus derived the materials for the composition of his drama from the same source to which Mr. Hollingshead had himself resorted, namely, the latter's novel. The question is, whether the defendant has caused to be represented the production of Mr. Hollingshead. In fact, the drama written by Mr. Hollings-

(1) 9 C. B. (N.S.) at p. 759. (2) 32 L. J. (Ch.) at p. 537; 1 H. & M. 747.

head and the drama written by Mr. Grattan are quite independent of each other. The defendant acted bonâ fide without any knowledge that Mr. Hollingshead had dramatised his own work: the defendant proceeded just as the assignee of any dramatic author might have done in the assertion of what he believed to be a perfect and undeniable right, and caused the drama which Mr. Grattan composed of the materials taken from Mr. Hollingshead's story to be represented on the stage. The first case of *Reade* v. *Conquest* (1) establishes this proposition, that an author has a right to convert a novel written by another person into a drama without infringing the copyright existing in the novel. It follows that two persons may dramatise the same novel, for that is common property. It is true that a writer cannot produce and represent a drama which he has borrowed from a drama written previously by another person; he would then be representing the production of the first dramatist, contrary to the terms of the Act of Parliament. I wish to guard myself against being supposed to lay down that, if a writer, while dramatising a novel, takes the incidents, characters, and dialogue of a previous drama founded upon that novel, and reproduces what is in substance identical with the previous drama, there might not be an infringement of the right of the earlier dramatist, if the later drama be represented on the stage. It is not necessary, however, to decide that, because here the two dramas are not identical; there is a great deal of difference between the two, the later work being by far the larger, the more complete, and the more perfect form into which the materials of the novel have been thrown. The author of a novel is not protected against having his novel put into the form of a drama by different persons, and it seems to make no difference that he himself has dramatised it. When an author has once given his novel to the world, he cannot take away from other persons the right to dramatise it by himself transforming it into a drama, subject to this, that they must not borrow from his drama but only from his novel. The author of a drama is not protected by the common law, and what the defendant has done is not forbidden by any statute. I therefore think the nonsuit ought not to be set aside.

(1) 9 C. B. (N.S.) 755; 30 L. J. (C.P.) 209.

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BLACKBURN, J. I am of the same opinion. I take it that when Mr. Hollingshead wrote his novel he merely published it as a book, although, no doubt, he had the intention of ultimately dramatising it; and according to the decision in the first case of *Reade* v. *Conquest* (1), which seems to me perfectly right, Mr. Hollingshead merely acquired the right to restrain persons from printing and publishing and multiplying copies of his novel; and however shabby and discreditable it may seem, any person has a right to dramatise the novel without being liable to an action on the ground that Mr. Hollingshead had the copyright. The defendant having represented a drama taken from Mr. Hollingshead's novel, he is sued on the ground that before the drama performed by the defendant had been written, Mr. Hollingshead had also composed a drama founded upon the novel, which drama he sold and assigned to the plaintiff. It is now urged on the plaintiff's behalf that he had the monopoly of representing not only the drama composed by Hollingshead, but also of restraining the performance of any other drama originating from the same source.

Before going to the statute, I may observe that, in my opinion, the previous publication of the novel did not prevent Mr. Hollingshead from being the owner of the drama adapted from it; on the contrary, I think he was the proprietor of it, and could make a valid assignment of it to the plaintiff. And I also think that Mr. Grattan, was the author of the drama represented by the defendant, and if it were pirated the defendant, as the assignee of Grattan, would be entitled to restrain the piracy. I do not see any reason why both Mr. Hollingshead and Mr. Grattan are not to be considered as authors to the extent to which they have exercised their ingenuity in turning the novel into a drama.

The question really turns upon ss. 1 and 2 of 3 & 4 Wm. 4, c. 15. It is not denied that, if the first drama had been written by a person other than Mr. Hollingshead, an action could not have been maintained against the defendant for representing Mr. Grattan's drama, inasmuch as the latter is not taken from the earlier production, but only from the novel, which was the common source. Notwithstanding a dictum of Erle, C.J., in the first case

(1) 9 C. B. (N.S.) 755; 30 L. J. (C.P.) 209.

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of *Reade* v. *Conquest* (1), and another of Wood, V.C. (2), who appear to have been of a different opinion, I cannot think that the mere fact of Mr. Hollingshead being himself the author of the novel, as well as of the first drama, makes any difference. I think that the defendant has represented the novelistic production of Mr. Hollingshead, but has not represented his dramatic production; and I think this follows from the second case of *Reade* v. *Conquest* (3) when that case is properly considered. There the plaintiff had written a novel founded upon a play called 'Gold,' also written by him; he took out some portions of the play and put them into the novel called 'Never too late to Mend:' the defendant being in ignorance of the plaintiff's play, took portions of the novel, which were also in the plaintiff's play, and inserted them in a drama of his own. The Court of Common Pleas held, that inasmuch as the defendant had in fact taken portions of 'Gold,' though he had taken them out of the novel 'Never too late to Mend,' and thereby had reproduced parts of 'Gold,' his ignorance of his having infringed the rights of the plaintiff in 'Gold' was no reason why he should not be liable in an action at the suit of the plaintiff. But in the present case the facts are of a contrary description. Mr. Hollingshead has taken parts of the novel and put them into a drama, and it is contended that Mr. Grattan having taken parts out of the novel, this is therefore an appropriation of portions of Mr. Hollingshead's drama. This argument seems to me to be incorrect in point of fact, and I think that the defendant cannot be held liable. I think, as at present advised, that if Mr. Hollingshead's drama had been plagiarised the defendant would have been liable to an action; and in the present case if Mr. Hollingshead's drama had been produced upon the stage a jury would have found that Mr. Grattan, having the means of knowing of Mr. Hollingshead's drama, had, as a matter of fact, plagiarised from it; but Mr. Hollingshead's drama never having been represented, Mr. Grattan did not plagiarise, and therefore the defendant is entitled to keep the nonsuit, and the rule must be discharged.

(1) 9 C. B. (N.S.) at p. 759.

(2) In *Tinsley* v. *Lacy*, 32 L. J. (Ch.) at p. 537; 1 H. & M. 747.

(3) 11 C. B. (N.S.) 479; 31 L. J. (C. P.) 153.

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QUAIN, J. In order to enable the plaintiff to succeed, he must prove that the defendant has represented the dramatic production of the plaintiff or the plaintiff's assignor. I think that this has not been established. In the first place, the dramatic production of Mr. Hollingshead was neither published nor represented. Mr. Grattan had no knowledge of its existence. Therefore it cannot be said that the defendant caused to be represented the dramatic production of Mr. Hollingshead. The second case of *Reade* v. *Conquest* (1) certainly goes a long way; but it is quite distinguishable from the present case, inasmuch as here the novel was written first; and, as is clear from the first case of *Reade* v. *Conquest* (2), anybody might have dramatised the novel if Mr. Hollingshead had not dramatised it, and I cannot understand that his putting the novel afterwards into the form of a drama can deprive other persons of the right to dramatise the novel which they enjoyed before he did so; especially when the fact that Mr. Hollingshead himself had dramatised it was unknown to the public. I therefore think the rule must be discharged.

ARCHIBALD, J. I am also of the same opinion. The rights of the parties depend upon the true construction of 3 & 4 Wm. 4, c. 15. There is no complaint made of an infringement of the plaintiff's book copyright in his novel; the complaint is an infringement of his stage right, so to speak, in the drama, and the question is, has there been a representation of any production of the plaintiff which falls within s. 1 of the Act? Now without going again into the reasons given by the other members of the Court, there is a clear and intelligible distinction between this case and the second case of *Reade* v. *Conquest*. (1) The grounds of that decision appear to be that there the drama was first composed, and afterwards the novel; and if there had been a direct copying by the defendant from the drama, that clearly would have been a violation of the Act; the novel, having been composed after the drama, was regarded by the Court of Common Pleas as in some sense a copy of the drama, so that in copying from the novel, and using the novel for the purpose of dramatising it, the

(1) 11 C. B. (N.S.) 479; 31 L. J. (C. P.) 153.

(2) 9 C. B. (N.S.) 755; 30 L. J. (C. P.) 209.

defendant was treated as copying indirectly from the published drama; a drama produced under these circumstances might be a reproduction of a drama composed by the plaintiff. But the present case is different. The novel is first composed, and then the drama is composed from the novel, and the defendant, in copying from the novel, or in using the novel for the purpose of his drama, cannot be said in any way to have made an indirect use of the plaintiff's drama, the more especially as it is admitted that he was wholly unaware of the plaintiff's or Mr. Hollingshead's drama. And as the novel upon its publication became open to Grattan, as to all the world, for the purpose of dramatising, the case does not fall within s. 2; the representation of Grattan's drama not being a representation of the plaintiff's drama.

Rule discharged.

Attorneys for plaintiff: *Benham & Tindell.*
Attorneys for defendant: *J. & J. Hopgood.*

IONIDES AND ANOTHER *v.* PENDER. *May* 27.

Marine Insurance—Concealment—Excessive Valuation of Goods.

Upon effecting a policy of marine insurance the assured is bound to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters in practice act.

Where, therefore, in an action on a policy of marine insurance, it appeared that the plaintiffs had insured the goods at a value very greatly over their real value, without disclosing the over-valuation to the underwriter; and it was proved in evidence that underwriters do, in practice, act on the principle that it is material to take into consideration whether the over-valuation is so great as to make the risk speculative:—

Held, that this practice is rational; and that it was proper to leave to the jury, whether the valuation was so excessive, and whether it was material to the underwriter to know of such over-valuation.

ACTION on a policy of marine insurance.

At the trial before Hannen, J., at the London sittings after Trinity Term, 1872, a verdict was entered for the defendants.

A rule was afterwards obtained calling on the defendants to shew cause why a new trial should not be had, on the ground that the learned judge misdirected the jury in his definition of excessive

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valuation, in telling them that concealment of the fact of excessive value in the absence of fraud might avoid the policy, and not telling them that there was no evidence of the materiality of the concealment; and in not telling them that, under the circumstances and with regard to their findings, there was no evidence of any loss except by the perils insured against, and on the ground that the verdict was against the weight of evidence.

The pleadings, the facts of the case, the course at the trial, and the arguments sufficiently appear from the judgment of the Court.

May, 10, 11, 12. *Sir H. James, Q.C., W. Williams, Q.C.*, and *Lanyon*, shewed cause. They cited *Haywood* v. *Rodgers* (1); *Carter* v. *Boehm* (2); Arnould on Insurance, 4th ed. p. 511; Phillips on Insurance, ss. 531, 537; *Elton* v. *Larkins* (3); Parsons on Insurance, vol. i. pp. 494, 495; Duer on Insurance, vol. ii. pp. 388, 518; *Barker* v. *Janson* (4); *Murgatroyd* v. *Crawford* (5); *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance* (6); *Rickards* v. *Murdock.* (7)

Sir J. B. Karslake, Q.C., Butt, Q.C., and *F. M. White*, in support of the rule, cited *Ruggles* v. *General Interest Insurance Co.* (8), *Clason* v. *Smith* (9), *North of England Insurance Association* v. *Armstrong* (10), *Lewis* v. *Rucker* (11), *Shawe* v. *Felton* (12), *Irving* v. *Manning* (13), *Feise* v. *Aguilar* (14), *Usher* v. *Noble* (15), *Forbes* v. *Aspinall.* (16)

Cur. adv. vult.

May 27. The judgment of the Court (Blackburn, Lush, and Archibald, JJ.) was delivered by

BLACKBURN, J. This was an action on three policies of insurance, by the ship *Da Capo*, on a voyage to Wladiwostock, all dated on the 1st of May, 1871.

(1) 4 East, 590.
(2) 3 Burr. 1905.
(3) 5 C. & P. 385.
(4) Law Rep. 3 C. P. 303.
(5) 3 Dallas, 491.
(6) 17 Wend. 359.
(7) 10 B. & C. 527.
(8) 4 Mason, 74.
(9) 3 Washington, 157.
(10) Law Rep. 5 Q. B. 244.
(11) 2 Burr. 1169.
(12) 2 East, 109.
(13) 1 H. L. C. 287.
(14) 3 Taunt. 506.
(15) 12 East, 639.
(16) 13 East, 323.

The first was on commissions on goods valued at 14,700*l.*, the commissions being valued at 1500*l.*

The second was on profits on charter, valued at 280*l.*

The third had originally been on goods, but by an indorsement on the policy it had become on 222 casks of spirits, valued at 2800*l.*

The material pleas were, that the ship was not lost by the perils insured against; and that there had been a concealment of a material fact.

Particulars were given of this last plea; the one on which the question before us turns was, that the insured knew and concealed from the defendant that insurances were made by him, and others in concert with him, on interests alleged to be at risk in the vessel, on values greatly exceeding the actual value of those interests.

The case came on to be tried before my Brother Hannen. It appeared in evidence that Wladiwostock is a harbour, south of what, in 1870, was the customs line of Russia. It was intended by the Russian government to bring their customs line lower down, so as to include Wladiwostock within it; and this was in fact done in February, 1871. Richard Diekman was the person interested in these policies. He gave in substance this account of the transaction. Having learned that this change was in contemplation, and believing it would make shipments to Wladiwostock very profitable, he entered into a speculation with one Weneke, by which Weneke was to purchase a ship and charter her to Diekman, who was to procure the goods he considered suitable to the market, put them on board, and travel overland to Wladiwostock, where he would meet them and sell them. The *Da Capo* was accordingly bought by Weneke, through the instrumentality of Diekman. Diekman found some persons willing to send out some goods on this adventure. Those persons insured their goods for 1080*l.* The freight on those goods was fixed by bill of lading at a higher rate than the charter freight. This formed the subject of the policy on profits on charter. No evidence was given as to the value of the goods thus insured for 1080*l.*, which therefore, it may be taken, were fairly valued. Diekman, not being able, for want of funds, to fill up the whole vessel, Weneke purchased goods similar to those purchased by Diekman, and filled up the

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vessel with them. These were to be sold by Diekman. Under these circumstances Diekman and Weneke employed brokers at Hamburgh to procure insurance; and those Hamburgh brokers employed the plaintiffs on the record, Ionides and Chapeaurouge, brokers in London, to procure insurance there. A slip was made out by Ionides and Chapeaurouge, on the 29th of March, 1871, for insurance of 8000*l.* on commissions and goods per *Da Capo* to Wladiwostock. After making inquiries about the port, which was quite unknown, various underwriters, including the representative of the defendant, initialed this slip at 3½ per cent. Nothing appeared on the face of this slip as to any future declaration or valuation of the subject-matter of the insurance, but from the conduct of all parties it must have been understood that the interest was to be subsequently declared and valued. The Hamburgh broker, towards the end of April, forwarded to Ionides and Chapeaurouge a paper in German, declaring the interest to be on spirits with anticipated profit however high or low, and on other goods with anticipated profit at 25 per cent. This valuation was certainly seen by the manager of the North China Company, whose name was on the slip before that of the defendant's representative, for he had initialed it. He stated, however, that he did not understand German, and was not aware what was in it. Whether it was ever seen by the defendant's representative or not was left in doubt, but, in summing up, the learned judge treated the case as if it had been seen by him also.

The policies were then made out and signed. The vessel sailed on the 1st of May and, on the 18th of May, sank at sea, under circumstances making it very difficult to understand how she came to sink, unless she was purposely scuttled.

It appeared that Weneke had insured the ship and freight at a fair value; but that he and Diekman had here and abroad insured the goods which they had put on board at values very considerably above their cost price. The price, including cost charges and insurance, amounted in the whole, to something less than 8000*l.*, the various insurances on the goods, including profits, amounted to about 14,000*l.*; and in addition to these, there was the insurance on commissions of 1500*l.* and a further insurance of 1000*l.* on safe arrival, so that the assured stood to receive a very large

profit if their venture was lost. This was used as an argument to induce the jury to draw the inference that the vessel was purposely scuttled by the captain, in complicity with the assured; but, besides this, the defendants contended that these high valuations ought to have been disclosed by the assured. The highest valuation was that of the spirits. It appeared in the evidence, that the costs, charges, and insurance of the 222 casks of spirits amounted to 973*l.*, and for insurance they were valued at 2800*l.* Diekman, in his evidence, justified this high valuation by saying that spirits were a very profitable article, and also that he hoped and expected that his spirits would arrive when they could be imported duty free, and that a very heavy Russian duty was about to be imposed immediately afterwards, which would have the effect of raising the value of his spirits to the level of duty-paid spirits. The defendant called underwriters, who gave evidence, without any objection being made, that it was material to underwriters to know the extent of the overvaluation when it was to such an extent as appeared in this case. They also stated in effect that, where the valuation was excessive the risk was considered a speculative risk, which one class of underwriters would not take at all, and another class would take but only if a sufficient premium was offered; that 25 per cent. added was not unusual, and that in one case 30 per cent. had been taken by the first class; but beyond this it would be a speculative risk.

On this evidence my Brother Hannen proposed to ask the jury seven questions: First: Whether the goods were really put on board? Secondly: Were the valuations for insurance excessive? Thirdly: If excessive, were they so made with a fraudulent intent? Fourthly: Whether fraudulent or not, was it material to the underwriter to know that the valuation was excessive? Fifthly: Was it concealed from the underwriters? Sixthly: Was the vessel lost by perils insured against? Lastly: Did the assured know or intend that the vessel should be cast away? The counsel for the defendant admitted that the first question must be answered in favour of the plaintiffs. The other six questions were asked of the jury, who answered: That the valuations were excessive; that there was not sufficient evidence to shew whether they were made with fraudulent intent; but that, whether fraudulent or not, it

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was material to the underwriter to know that they were excessive; and that that was concealed. That the vessel was not lost by the perils insured against; but that they had not sufficient evidence to shew whether the assured knew or intended that the vessel should be cast away. Some attempts were made to get the jury to express a further opinion on the mode in which the vessel was lost, without success. The verdict was then entered for the defendant on these findings.

In the ensuing term, Mr. Butt obtained a rule nisi for a new trial, on the grounds of misdirection as to the concealment and as against evidence. Delays and difficulties came in the way of hearing the argument, but in the three days next after last term it came on before my Brothers Lush, Archibald, and myself. We desired the counsel for the present to confine themselves to the question whether there was any ground for disturbing the verdict on the plea of concealment, supposing that plea had stood alone, or the jury had been discharged on the other issue, leaving it for further discussion whether that would finally dispose of the rule. We have come to the conclusion that there is no ground for disturbing the verdict on this issue.

My Brother Hannen, in summing up, pointed out to the jury that a valuation of goods for the purpose of insurance might fairly and properly be made, taking into account not only the original cost of the goods, but adding an estimate of the anticipated profits if the goods arrived at their destination; and that opinions might vary as to the profit to be made on a particular venture. He advised them not to find the valuation excessive, unless they thought the goods were valued with an addition of profit greater than could be expected to be realised under any circumstances which could be reasonably contemplated.

This may perhaps be too favourable to the assured, as it makes the question, whether there is an excessive valuation or not, depend on whether the valuation was so high as to amount in part at least to a wager; but no objection on that ground can be taken by the plaintiffs. And we think that the evidence here was such as to justify the jury in finding that the valuation of the spirits at least was excessive according to this definition, and this finding cannot be considered as against the weight of evidence.

The finding, that the excessive valuation was concealed from the underwriters, was impugned on the ground that the statement in the German valuation, that the spirits were valued with anticipated or imaginary profits, be the same high or low, amounted to a disclosure that the valuation was excessive. As to this, my Brother Hannen told the jury, and we think quite rightly, that in the absence of some active deception, the assured had a right to suppose that an underwriter read and understood the documents laid before him, and that if he did not understand the language in which they were written, he would ask for a translation; and he assumed in his summing-up, that the defendant's representative had independent notice that the valuation contained the words "profits however high." This we have not found in the notes of the evidence; but it probably was so. But then he asked the jury to consider, whether that was a disclosure that there was an excessive valuation, in the sense, which he had previously explained to them, of an estimate of profits formed with knowledge that it had no foundation. The jury must be taken to have found that it was no disclosure. And we cannot say that they were wrong.

The finding of the jury, that the concealment was material, was impeached, both on the ground that it was against evidence and of misdirection: as it was contended that the judge ought to have told the jury that the fact of an excessive valuation was not one which the assured was bound to disclose.

It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy. In Duer on Insurance, vol. ii. p. 388, it is said: "The terms in which the general rule is usually stated are, that it is the duty of the assured to communicate all facts that are material to the risks, and which are not known or presumed to be known to the underwriter; but these terms are ambiguous, and the first and necessary inquiry is, by what criterion the materiality of the facts alleged to have been concealed is proper to be determined. Is the obligation of a disclosure limited to the facts that are material to the risks considered in their own nature? Or does it extend to all that may be deemed material by the insurer and would probably influence his ultimate

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decision?" He admits that a knowingly false representation of a matter which, though extraneous to the risks, may affect the judgment of the underwriter, will vitiate, and that the case of *Sibbald* v. *Hill* (1) is an express decision of the House of Lords to that effect. But he lays it down as being "the most reasonable opinion that those facts only are necessary to be disclosed which, as material to the risks considered in their own nature, a prudent and experienced underwriter would deem it proper to consider." The cases and proofs in support of his position are collected by Duer, at p. 518.

It was argued before us, that the nature of the risk (that is to say, the strength and seaworthy qualities of the *Da Capo*, and the probability of encountering storms on the voyage, and so forth) was not in the least affected by the amount at which the goods were valued: which is no doubt true. The underwriter is not answerable for any loss occasioned by fraud of the assured; and it was argued, that therefore the objection, which an underwriter might have to take a risk on account of the temptation which the assured might have to make away with the venture, ought not to be taken into account. Whether Duer would have gone so far as this is not clear; but if he would, the courts in America have refused to follow him: see the case of *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance* (2), cited in the argument before us. In that case the plaintiffs had insured certain property against fire, and the president of the company heard that the person insuring with them, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place, the insured came upon the plaintiffs, who came upon the defendants. The judge directed the jury that if this information given to the president of the plaintiffs was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the Court, on appeal, directed a new trial on the ground that the concealment was of a material fact, and, whether intentional or not, it vitiated the insurance.

It is to be observed that the excessive valuation not only may

(1) 2 Dow, 263. (2) 17 Wend. 359.

lead to suspicion of foul play, but that it has a direct tendency to make the assured less careful in selecting the ship and captain, and to diminish the efforts which in case of disaster he ought to make to diminish the loss as far as possible, and cannot therefore properly be called altogether extraneous to the risks; but we would scarcely base our judgment on so special a ground.

We agree that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required. But the rule laid down in Parsons on Insurance, vol. i. p. 495, that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act, seems to us a sound one. We do not think any of the cases cited by Duer are in contravention of it; and applying it to the present case, there was distinct and uncontradicted evidence that underwriters do in practice act on the principle that it is material to take into consideration whether the overvaluation is so great as to make the risk speculative. It appears to us a rational practice. We think, therefore, that the judge could not do otherwise than leave this question to the jury, and that their verdict was not against the weight of evidence, and should not be disturbed.

It will be for the counsel on both sides to consider what course they will take as to the rest of the rule.

Rule as to the issue on concealment discharged.

Attorneys for plaintiffs: *Hillyer, Fenwick & Stibbard.*
Attorneys for defendant: *Hollams, Son, & Coward.*

1874
July 6.

ASHCROFT AND OTHERS *v.* THE CROW ORCHARD COLLIERY COMPANY, LIMITED.

Ship and Shipping—Charterparty—Demurrage—Delay in Loading—"To be loaded with the usual Dispatch of the Port."

By charterparty the master of the plaintiffs' vessel, the *D.*, engaged to receive on board and load a cargo of coal at the port of L., "to be loaded with the usual dispatch of the port, or if longer detained to be paid 40*s.* per day demurrage," and the defendants engaged to load upon the above terms. The loading was to take place at the B. docks, and by one of the regulations of the docks no coal agent was to be allowed to have more than three vessels in the B. docks loading and to load at the cranes at one time. The defendants acted as their own coal agents, and when the charterparty was entered into they had three ships loading in B. docks, and ten other charters in their books having priority over the plaintiffs. In consequence of these engagements the *D.* was not allowed to go into the B. docks until thirty days after she was ready to do so:—

Held, that the contract by the defendants was absolute to load with the usual dispatch of the port of L.; that the *D.* had not been so loaded; and that the defendants were therefore liable to pay for the delay.

Tapscott v. *Balfour* (Law Rep. 8 C. P. 46) distinguished.

FIRST count for a breach of a charterparty for not loading with the usual dispatch of the port of Liverpool.

Second count for not obtaining within a reasonable time an order entitling the plaintiffs' vessel to enter the Bramley Moore Dock at Liverpool.

Third count for demurrage, and for money due on accounts stated.

Pleas: 1, as to first and second count, a denial of the promises; 2, as to same, a denial of the breaches; 3, as to residue of declaration, never indebted.

Joinder of issue.

At the trial before Quain, J., at the Liverpool summer assizes, 1873, a verdict was entered for the plaintiffs for an agreed sum, leave being reserved to move to enter a verdict for the defendants.

A rule was accordingly obtained, on the ground that the facts proved did not, on the true construction of the charterparty, disclose any liability on the part of the defendants.

June 11. *Aspinall, Q.C.*, and *Bremner*, shewed cause.

C. Russell, Q.C., and *Lupton*, in support of the rule.

The facts, the course of the trial, and the arguments sufficiently appear in the judgment of the Court.

In addition to the cases referred to in the judgment, the following authorities were cited: *Ford* v. *Cotesworth* (1); *Harris* v. *Dressman* (2); *Shadforth* v. *Cory*. (3)

Cur. adv. vult.

July 6. The judgment of the Court (Mellor, Lush, Quain, and Archibald, JJ.), was delivered by

LUSH, J. This was an action for demurrage tried before my Brother Quain at Liverpool, when a verdict was entered for the plaintiffs for 60*l*., being for thirty days demurrage, with leave to the defendants to move to enter a nonsuit; the Court being empowered to draw all inferences of fact and to amend the pleadings if necessary. All questions of reasonableness were to be for the Court.

By the charterparty, dated, Liverpool, the 22nd of January, 1873, the master engaged to receive and load on board his vessel the *Christiana Davies*, of Barrow, a full and complete cargo of coal, about 140 tons, and proceed to Belfast and deliver the same as per bills of lading at certain specified freight, &c. "To be loaded with the usual dispatch of the port and discharged 25 tons per working days, or if longer detained to be paid 40*s*. per day demurrage." The defendants thereby engaged to load the vessel "on the above terms." By a memorandum at the foot, the vessel was to load in the Bramley Moore or Wellington Docks, high level railway.

By the published dock regulations, which it must be taken were known to both parties, it is ordered amongst other things, "No vessel is to be allowed to enter the Bramley Moore or Wellington Docks to load coal from the high level railway except upon the production of a jerque note or a certificate from the master of the dock in which the vessel is lying at the time, shewing that she is ready to commence loading, and also a certificate from the coal agent that she is to load coal at the high level. No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three

(1) Law Rep. 4 Q. B. 127. (2) 23 L. J. (Ex.) 210.
(3) 32 L. J. (Q.B.) 79; in error, p. 379.

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vessels in the Bramley Moore or Wellington Docks (both inclusive) loading and to load at the cranes at one time.

"No vessel to be entered in the application or berthing book before she is in either the Bramley Moore or the Wellington Dock; each vessel to be berthed in regular turn as entered, if the specified quantity of coal is at the Sandhills Station; if not, the next vessel on turn, having sufficient coal ready, to take the berth; any vessel losing her turn in consequence of coal for her not being ready at the Sandhills Station to be considered first on turn when the coals are ready. Flats and vessels to follow the same order as to turn for loading whether entered for the cranes or the shoot."

It was admitted that the master obtained in proper time the requisite certificate from the master of the dock in which the vessel was lying, and that the defendants gave their certificate in proper time; also that the vessel was regularly put on the dock books and would have been loaded without delay had it not been for the fact, which fact was unknown to the master at the time she entered into the charterparty, that the defendants acted as their own coal agents, and that they had at the time three ships loading in the dock, and ten other charters in their books, which had priority over the plaintiffs. In consequence of these engagements, the vessel was not allowed to go into dock till the 5th of March, a period of thirty days after she was ready to do so. The loading was commenced and completed on the following day.

It was conceded that thirty days was an unusual period of detention, and that the delay was caused not by the pressure of business in the dock or any inability on the part of the dock company to facilitate the dispatch of the vessel, for vessels booked after the *Christiana Davies* by other coal agents were loaded and dispatched before her, but solely by the incapacity, which the defendants had placed themselves under by their previous engagements, of getting a berth for her at an earlier period.

On the other hand, it was conceded that the defendants were guilty of no delay which it was in their power to avoid consistently with their previous engagements.

The question is then, what is the contract which the defendants entered into by the charterparty? The words are, not that the

vessel is to be "loaded in turn according to the charterer's books or engagements," or to be loaded "next after a particular vessel," or in any other prescribed order; but "to be loaded with the usual dispatch of the port."

The defendants' counsel contended that these words apply only to a delay in the process of loading when the vessel has arrived at the berth, and that they have no reference to a detention outside the loading place, though caused by the act or default of the charterer, and he relied upon the case of *Kearon* v. *Pearson* (1) in support of the position. That case, however, by no means justifies the argument based upon it. The words of the charter were in substance the same as here, namely, "to be loaded with usual dispatch." The facts were that the loading was, after it had commenced, interrupted by a severe frost, which closed the canal through which the coals were to be brought from the pit, and thus prevented the charterer from getting them to the loading place; and the Court held the meaning of the clause to be, that the vessel should be loaded with the usual dispatch of persons who had a cargo in readiness at the dock for the purpose of loading, and therefore that the charterer was responsible for the delay occasioned by the frost. So far from supporting the argument that the charterer is not liable for delay occasioned by his own act or default, that case establishes that the engagement to load "with the usual dispatch" is absolute, and admits of no qualification so as to dispense with performance, even where the performance was hindered by a casualty which the charterer could not prevent. It is true the delay in that case occurred during the process of loading, and the Court had not to consider what would have been the effect of a detention at the dock's mouth, but we see no reason for limiting the obligation to the mere process of loading. It undoubtedly includes that process, and requires it to be done with the usual dispatch, but we are of opinion that it goes further and covers the whole period from the time when the vessel at the port is placed at the disposal of the charterer there in a condition to receive her cargo. The object is to provide against unusual delay on the part of the charterer in putting the cargo on board, and whether the delay occurs in the course of loading or before the loading commences.

(1) 7 H. & N. 386; 31 L. J. (Ex.) 1.

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whether it consists in keeping the vessel outside or inside the dock, is obviously immaterial. The question is whether the vessel is at his disposal, and whether the detention is his act. If so, the contract is broken as much in the one case as in the other.

It was further contended that the vessel could not be said to have been ready to receive cargo so long as she lay outside the dock; that it is the duty of the shipowner to find his way into the dock; and that he takes the risk of any obstacles which occur to prevent his getting there; and *Tapscott* v. *Balfour* (1) was relied on in support of this argument. That was a charter under which the ship was ordered to load in one of the docks mentioned in this charter, the Wellington Dock, which was governed by the same regulations as the Bramley Moore Dock. The vessel was detained there, as in this case, outside the dock, and for a similar reason, namely, because the coal agent who had the loading for the charterer, had not only three vessels in the dock at the time, but two others booked to come in before the plaintiffs. The Court held that the lay days commenced only from the time when the vessel was admitted into the dock, the loss arising from being kept outside by virtue of the dock regulations being a loss the risk of which was undertaken by the shipowner.

At first sight that case appears to bear a close resemblance to the present case, and it is not to be wondered at that the defendants' counsel strongly relied upon it as an authority in his favour. But when examined, the supposed resemblance disappears. The words of the charter were: "The vessel shall proceed direct to any Liverpool or Birkenhead dock as ordered by charterer, and there load, in the usual and customary manner, a full and complete cargo of coals." The Court held that this stipulation applied to the mode and not to the time of loading. "There is," says Bovill, C.J., "no express stipulation with respect to the time at which the loading is to commence, except that it is not to commence before the 1st of July. Then what is the ordinary rule under such circumstances, where the port, but no particular place in the port to which the vessel is to proceed, is named? It means that the time is to commence from the arrival of the vessel at the usual place of loading in that port. The stipulation is, in effect,

(1) Law Rep. 8 C. P. 46.

that the vessel should proceed to the Wellington Dock and there load her cargo. Therefore the lay days do not commence till she has got into the Wellington Dock. If by reason of the dock regulations she cannot enter into that dock before a certain time, the loss by such delay must fall on the shipowner."

Assuming this construction of the clause in that charter to be the corrrect one, the grounds of the judgment are inapplicable to the present case. The intention of the parties here was evidently that the charterer should not, and the words bind him that he will not, detain the vessel for want of cargo beyond the usual and ordinary period of delay at the dock.

Evidence was given to shew that the plaintiffs might, if they had chosen, have obtained information from the dock-master before they entered into the contract as to the number of vessels which the defendants had in the dock or on their books, but they were under no obligation to do so, and it would have been immaterial if they had, and if it were shewn that they knew these facts.

We construe the stipulation as a contract by the charterer that he will load with the usual dispatch, and it is no answer to say that he was unable to do so, nor would it be any more an answer to say that the plaintiffs knew it. The ground on which leave was reserved having failed, the verdict stands for the amount agreed on at the trial.

Rule discharged.

Attorneys for plaintiffs: *Bremner & Son, Liverpool.*
Attorneys for defendants: *Venn & Son.*

1874
June 5.

TAYLOR and Others *v.* THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY.

Ship and Shipping—Bill of Lading—Exemption of "Thieves," "Barratry," "Damage to Goods which can be insured against."

The plaintiffs shipped at Liverpool, on board defendants' ship for New York, a box of diamonds under a bill of lading by which were excepted, inter alia, "pirates, robbers, thieves, vermin, barratry of master and mariners. . . ." The box was stolen during the voyage or on the ship's arrival in port, before the time for delivery; but there was no evidence to shew whether it was stolen by one of the crew or by a passenger, or, after her arrival, by some person from the shore:—

Held, first, that "thieves" must be interpreted as in a policy of insurance, and only applied to thieves external to the ship; and, assuming theft by one of the crew to be "barratry," secondly, that it lay on the defendants, the shipowners, to bring the loss within one of the exceptions, by shewing by whom the theft had been committed; and that the plaintiffs were therefore entitled to recover for the loss.

The bill of lading also contained a clause: "the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance":—

Held, that "damage" would include damage to the goods amounting to a total loss or destruction of them, but did not apply to the case of the abstraction of the goods.

Case stated without pleadings.

The action was brought to recover damages for the non-delivery and loss of a box of diamonds.

The plaintiffs are merchants carrying on business in New York. The defendants are the owners of the steamship *Nevada*, one of a line of passenger ships running between Liverpool and New York.

On the 25th of July, 1871, the plaintiffs caused to be shipped at Liverpool, on board the *Nevada* for New York, five boxes of diamonds, and the defendants accepted and received them from the plaintiffs to be carried on board the ship from Liverpool to New York, on the terms of five bills of lading respectively, which were all in the same form.

The following are the material parts of the bill of lading: "Received, in good order, &c., on board the steamship *Nevada*, one box, said to contain precious stones of the value of 950*l.*, to be delivered from the ship's deck (subject to the exceptions and restric-

tions in the following and undermentioned clause) at the port of New York: The act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of master and mariners, restraints of princes and rulers or people, sweating, insufficiency of package in size, strength, or otherwise, leakage, breakage, pilferage, wastage, rain, frost . . . ; and all damage, loss, or injury arising from the perils or things above mentioned, and whether such perils or things arise from the negligence, default, or error in judgment of the pilot, master, the mariners, engineers, stevedores, or other persons in the service of the shipowner, always excepted."

The bill of lading also contained the following clause:—

"The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance. . . ."

Four of the boxes of diamonds were duly delivered by the defendants to the plaintiffs at New York, but the remaining box was stolen during the voyage, and has never been delivered to the plaintiffs. The diamonds were stolen when on board the ship, either on the voyage or after her arrival in port before the time for delivery arrived; but there was no evidence to shew whether they were stolen by one of the crew or by a passenger, or after her arrival by some person from the shore.

At the time of the shipment, the diamonds were insured for the voyage by two policies effected at Lloyd's. A claim for the loss in question was made upon the underwriters upon the policies and was paid.

The question for the opinion of the Court was whether the plaintiffs are entitled to recover from the defendants the value of the box of diamonds.

Cohen, Q.C. (with him *Hollams*), for the plaintiffs. On the facts stated in the case the defendants have not shewn the loss of the box of diamonds to have been caused by any of the excepted perils. The exception of "thieves" must receive the same interpretation as has been put upon the word "theft" in similar clauses in policies of insurance. In 2 Arnould on Insurance, p. 704, 4th ed., under the heading "Of thieves," it is said: "The theft that is insured against by name in the policy means that which is accompanied by violence (latrocinium), and not simple theft (furtum); it being

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an old and elementary rule of the law of insurance, that furtum non est casus fortuitus—is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes might have been prevented by the exercise of due vigilance." It lies on the shipowner to bring himself within the exception; but it is left doubtful in the case whether the loss was occasioned by latrocinium or furtum; for it is expressly stated that there was no evidence to shew whether the diamonds were stolen by one of the crew, by a passenger, or by some one from the shore. Again, the clause as to insurance will not avail the defendants, which says that "the owner is not to be liable for any damage to any goods which is capable of being covered by insurance." "Damage" to the goods must involve some injury to the goods, and cannot apply to the mere abstraction of them.

Herschell, Q.C. (with him *R. V. Williams*), for the defendants. "Damage" must include loss of the goods, otherwise a total loss could not be insured against; so that the defendants are within this exception. But the loss is also within the exception of "thieves." The word must have its general and wider meaning, and not be confined to the limited meaning which has been given to it in cases on policies of insurance, in which the clauses are very differently worded from the present clause. "Pilferage" is amongst the exceptions, which obviously is pointed at petty thefts by passengers or crew; and why is not "thieves" to be held to apply equally to these classes, and not merely to thieves outside the ship? If "thieves" is to have this restricted meaning, the preceding words "robbers" is rendered useless; whereas in *De Rothschild* v. *Royal Mail Steam Packet Co.* (1), it was held that "robbers" has the very meaning to which it is now sought to limit "thieves." Again, this loss may come under the exception of "barratry of the master or mariners." In 1 Phillips on Insurance, § 1071, it is said: "*Theft*, embezzlement, and wilful destruction of the property insured, are in their nature barratrous acts." The definition of barratry given in 2 Arnould on Insurance, pp. 706, 711, is to the same effect. Lastly, the loss being primâ facie brought within one of the exceptions, the onus lies on the plaintiffs to shew that it was caused in a manner or by a species of theft which is not within the excep-

(1) 7 Ex. 734; 21 L. J. (Ex.) 273.

tion. In *Czech* v. *General Steam Navigation Co.* (1) (it having been established by *Phillips* v. *Clark* (2), that the exception of "breakage, leakage, or damage" did not extend to such damage caused by the negligence of the shipowner), it was held that it lay on the plaintiffs, the shippers, to shew that the damage was caused by the defendants' negligence.

Cohen, Q.C., in reply. There is nothing in the decision in *Czech* v. *General Steam Navigation Co.* (1) to shew that the onus is on the plaintiffs in the present case; all that was decided was, that there was evidence for the jury that the damage was caused by the negligence of the defendants' servants, following out the principle of *Grill* v. *General Iron Screw Collier Co.* (3)

LUSH, J. This case is one of considerable difficulty, and I have felt great doubt during the argument as to the construction to be put upon the clause of exception in this bill of lading; but after consideration I have satisfied myself that the loss of this box of diamonds is not within any of the exceptions, and that the plaintiffs are entitled to judgment. The case states that the box was stolen while on board the vessel, either during the voyage or after her arrival in port; but there was no evidence to shew whether it was stolen by one of the crew, or by a passenger, or, after her arrival, by some person from the shore. From this statement we must take it as a fact that there were passengers on board. The question is, is that loss within any of the exceptions in the bill of lading, which are the act of God, the Queen's enemies, pirates, robbers, thieves, barratry of the master or mariners, &c.? The first question is, does "thieves" include persons on board the ship, or is it to be limited, as has been held in cases as to policies of insurance, to persons outside the ship and not belonging to it. The word is ambiguous, and, being of doubtful meaning, it must receive such a construction as is most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exceptions are framed; for if it was intended to give to it the larger meaning which is now contended for, the intention to give the shipowner that protection ought to have been

(1) Law Rep. 3 C. P. 14. (2) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.
(3) Law Rep. 1 C. P. 600.

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expressed in clear and unambiguous language. It is not, I think, reasonable to suppose, when the language used is ambiguous, that it was intended that the shipowner should not be liable for thefts by one of the crew or persons on board. The shipowner must protect himself if he intends this by the use of unambiguous language. I say nothing as to whether barratry can include theft by one of the crew, because there were passengers on board, and therefore the theft was not necessarily committed by one of the crew, but might have been committed by one of the passengers. Then is the loss within the exception as to insurance,—"the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance"? I do not agree that "damage" is limited, as Mr. Cohen contended, to partial damage or injury, as distinguished from a total destruction of the thing; if goods were so much damaged as to be totally destroyed, that would be damage within the clause. But I think that it must be confined to cases where the goods receive damage from some peril which may be insured against, and that it does not extend to the case of a loss which is occasioned not by any damage or injury, but by the total bodily abstraction of the thing. The remaining question is, is it for the defendants or the plaintiffs to shew that the loss is within one of the exceptions of the bill of lading,—on whom does the onus lie? I think it is for the defendants to bring the case within the exception, and that it lies upon them to shew that the act of theft was committed by some one outside the ship; and that the onus is not on the plaintiffs to shew the contrary.

The case of *Czech* v. *General Steam Navigation Co.* (1) seems to me to have no direct bearing on this case. There it was stipulated in the bill of lading that the shipowner should not be liable for breakage, leakage, or damage (which had been decided by previous cases not to include leakage, breakage, or damage caused by the negligence of the shipowner or his servants); and all the Court decided was, that assuming that it was necessary for the plaintiff, the shipper, to shew that the damage, being primâ facie exceptional, was caused by the negligence of the shipowner or his servants, there was sufficient evidence of such negligence, the nature of the damage itself being such as to shew this. That case

(1) Law Rep. 3 C. P. 14.

therefore does not touch the present. The shipowner is primâ facie responsible for the non-delivery of the box of diamonds. He says,—according to the meaning I have put upon the word "thieves,"—"I will not be liable for the loss if the box be stolen by persons not belonging to the ship." He has not shewn that the box was stolen by some person not belonging to the ship, consequently he fails to prove that the loss, for which he is primâ facie liable, was within any of the exceptions. The plaintiffs are therefore entitled to judgment.

ARCHIBALD, J. I am of the same opinion. The question is, what is the construction of the contract between the parties contained in the bill of lading, under which the shipowners are primâ facie liable for the non-delivery of the box intrusted to them for carriage? I have had considerable doubt during the argument, but I have come to the same conclusion as my Brother Lush, that the defendants have not brought themselves within any of the exceptions in the bill of lading. It was argued for the defendants, that the shipowner was not to be liable for any damage done to any goods which is capable of being covered by insurance, and that damage by the loss of the goods was included in this. But I think the clause cannot be taken to have so extensive a sense as this. The clause talks of damage to the goods; there may be damage to the owner by loss without damage to the goods, but to be within this clause the loss must be by damage to and not by the total abstraction of the goods. The clause points to some injury to the goods, the goods themselves remaining in specie. In the present case, therefore, the defendants cannot avail themselves of this clause. Then, have the defendants brought themselves within the exception as to thieves? This clause seems to have been copied from the clause contained in ordinary policies of insurance; and in policies of insurance "thieves" has been held to refer to theft with violence, to latrocinium as opposed to furtum. It is for the shipowner to shew that the intention was that the word should have the other meaning; and as the word is ambiguous, I think, without further explanation, it must be taken to have the meaning which it has already acquired when used in ordinary policies of insurance. If this be the sense in which it is

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to be taken, the defendants have not brought themselves within it, as it is quite consistent with the facts that the box was stolen by one of the crew, by a passenger, or by some third person from the shore after the ship arrived in port. For the same reason, viz. the uncertainty by whom the box was stolen, the question as to barratry does not arise. For these reasons I agree that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Hollams, Son, & Coward.*
Attorneys for defendants: *Gregory, Rowcliffes, & Co.*

May 22.

THE QUEEN *v.* THE INHABITANTS OF THE TOWNSHIP OF BRADFIELD.

Highway—Presumption of Dedication—Private Road set out under Inclosure Award.

On the trial of an indictment against a township for the non-repair of a highway, it appeared that the road had originally been set out in 1789 as a private road by an award under an inclosure Act, and the adjoining landowners or occupiers were ordered by the award ever after to keep the road in repair. There was enough evidence given of user by the public to support the presumption of a dedication in an ordinary case, before the passing of the General Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 23:—

Held, that there was nothing in the fact of the road having been set out by the award, which directed the repair to be by the adjoining landowners, to prevent the road becoming a highway repairable by the inhabitants at large.

Rex v. *St. Benedict* (4 B. & Ald. 447), discussed.

INDICTMENT for the non-repair of a public highway, called Myers Lane, in the township of Bradfield and the parish of Ecclesfield in the West Riding of the county of York, which the inhabitants of Bradfield were bound to repair.

Plea, not guilty.

At the trial before Denman, J., at the Spring Assizes, 1873, at Leeds, it appeared that the road in question, called Myers Lane, had originally been set out in 1789, by an award of inclosure commissioners under an inclosure Act of 24 Geo. 3, for inclosing Loxley Chase.

By the Act, the commissioners, before making allotments of the land to be inclosed, were required to set out such public highways and private roads, and passages through and upon the lands, as they should think proper, which public highways shall be forty feet in breadth at the least; and it was enacted: "That it shall not be lawful for any person thereafter to use any public highway or private roads or passages over the said lands, either on foot, or with horses, carriages, or cattle, other than such as shall be so set out and appointed. And that all private roads and ways, ditches, &c., shall be made and for ever thereafter supported, repaired, kept in repair, and cleansed, by such of the proprietors of the allotments to be made by virtue of this Act, or in such other manner, as the commissioners, or any two of them, shall by their award direct and appoint."

The award accordingly, after setting out Loxley Head Lane, afterwards and now called Myers Lane, as a carriage or drift road, of the width of twenty-four feet, "ordered, directed, and appointed, that the same shall at all times for ever hereafter, be repaired and kept in repair by the several and respective owners and occupiers of allotments adjoining to and lying on the north and south sides of the said road," &c.

It was admitted on behalf of the defendants, that there was ample evidence given of user by the public to support the presumption of a dedication in an ordinary case before 1835, when the General Highway Act (5 & 6 Wm. 4, c. 50), s. 23, was passed. But it was contended that the award prevented the road from ever becoming a highway repairable by the inhabitants of the township at large.

A verdict was directed for the Crown, with leave to move to enter a verdict for the defendants.

A rule was obtained accordingly, or for a new trial, on the grounds that there was not sufficient evidence of a dedication or of any liability of the defendants to repair, and that the duty to repair was not upon the defendants.

Maule, Q.C., shewed cause. The defendants rely on *Rex* v. *St. Benedict* (1), as deciding that a road set out as a private road to be

(1) 4 B. & Ald. 447.

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used by particular persons, cannot become through user by the public a public highway repairable by the inhabitants at large. But that case decides nothing of the kind; and if it does, it has been overruled by later cases, viz.: *Reg.* v. *East Mark* (1), and *Rex* v. *Wright.* (2) And as to the dictum of Bayley, J., that the inhabitants of a parish cannot be made liable to repair unless they have adopted the dedication, that was directly overruled in *Rex* v. *Leake.* (3)

Field, Q.C., in support of the rule. The reason why, at common law, the charge of repairing highways is thrown upon the parish, viz., that there is consideration for it, inasmuch as the owner of the soil, by dedicating it to the public, has given up his exclusive right, is not applicable to a case like the present, where the road is given for the use of particular persons by statute, without any reference to the ownership of the soil.

[QUAIN, J. In an *Anonymous Case* (4) it is said that even if particular persons are made liable to repair a highway, yet if they fail to do the repairs, the repairs may be cast upon the parish by the justices.]

In *Rex* v. *St. Benedict* (5) the road had been set out, in 1803, as a private road, as here, to be used by certain persons only, but had been used ever since by the public up to the time of the presentment, some time before 1820, as the trial was in that year; and Abbot, C.J., says: "I am of opinion that this was not a public road, and that the parish are not bound to repair it. It was in this case, as appears from the clause in the local Act, compulsory on the owner of the soil to permit a qualified passage, viz. to all persons entitled to use the old occupation road. That circumstance distinguishes this from the cases cited. If this be a public road, it would follow that whenever, under an inclosure Act, an occupation road was set out, and it happened to be convenient for passage, it would become, almost immediately, a public road, and the burden of repairing it would be thrown on the parish."

[BLACKBURN, J. I confess I have difficulty in following that reasoning. I do not understand the judgment as reported, if Lord

(1) 11 Q. B. 877; 17 L. J. (Q.B.) 177.
(2) 3 B. & Ad. 681.
(3) 5 B. & Ad. 469, 482, 487.
(4) 1 Ld. Raym. 725.
(5) 4 B. & Ald. 447, 449.

Tenterden meant to say that a private road set out under an inclosure award cannot become a public highway by user.]

The present case is stronger than that, because, in addition, there is the express direction in the award, following the powers given by the Act to the commissioners, that the road shall for ever be repaired by particular persons, viz. the owners or occupiers of the adjoining allotments.

BLACKBURN, J. I am of opinion that this rule must be discharged. The fact that the road was originally set out under the award of inclosure commissioners as an occupation road, to be used and repaired by particular persons, would prevent it becoming a public highway at first; and the owners would hold the land subject to this qualified right of way; but there was nothing whatever that I can see to prevent the owners from dedicating it to the public, so that it would become, instead of an occupation road only, a public highway. Then the law, as it then stood, said that if a road has become a highway the parish must repair it. The only difficulty that has arisen is from the case of *Rex* v. *St. Benedict* (1), in which Lord Tenterden is reported to have used language which at first sight seemed to say that where a road was originally set out as an occupation road it could never become a public highway repairable by the parish at large. But when one looks more closely at the case, Lord Tenterden's opinion does not appear to go so far as that. The road was originally set out, in 1803; at the trial in 1820, only seventeen years afterwards, it appeared that, from the date of the award, the road had been used by the public without interruption. And the question is stated to have been, whether under these circumstances this was a public road, which the parish was bound to repair. If by that is meant whether the jury were bound to have found that there had been a dedication to the public, the case would be intelligible and right enough; for it is clear that it was not incumbent upon them to find that there had been a dedication to the public upon that evidence; and Lord Tenterden may have been misunderstood by the reporter; all that he may have meant may have been that in the case of a road originally set out as an occupation road, the

(1) 4 B. & Ald. 447.

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degree of user by the public should be more narrowly watched than in a case where the way had never been private. Otherwise, as Lord Tenterden says, in the case of an occupation road, it would become almost immediately a public road. In order to make the parish liable without their assent, the dedication must have been before 1835; and the point has become of less importance since the passing of the General Highway Act.

QUAIN, J. I am of the same opinion. I know of no case, except the case which has been cited of *Rex* v. *St. Benedict* (1), which goes to shew that when a road has been set out under an award, and is to be repaired by particular persons, it cannot become a highway repairable by the inhabitants at large. *Harper* v. *Charlesworth* (2) does not go so far as this. In the present case the public user is admitted to have been sufficient to prove a dedication in an ordinary case; and at common law the parish became at once liable to repair. It is to be observed that a parish is liable to repair a highway, although particular persons may be also bound to repair it. Thus in *Rex* v. *St. George, Hanover Square* (3), it is said there is a common law liability on a parish to repair all the highways within its limits. And the inhabitants are bound to repair unless there is an express or implied exemption shewn. "The duty of repairing," says Lord Ellenborough, "may be imposed upon others, although the parish be still liable." Possibly in such a case the parish, if called upon to repair, may have a remedy over against the others. Again, in an *Anonymous Case* (4), per Holt, C.J. "The inhabitants of every parish of common right ought to repair the highways. And, therefore, if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants." As I have already said, there is no authority that a road set out as a private road under an award cannot become a public highway by user, except the questionable case of *Rex* v. *St. Benedict* (1); but I do not think that case decides any such proposition. The Court seem to have treated the case as matter of evidence, whether

(1) 4 B. & Ald. 447.
(2) 4 B. & C. 574.
(3) 3 Camp. 222.
(4) 1 Ld. Raym. 725.

the evidence was sufficient, from which to presume a dedication to the public; and no doubt the fact that the origin of the way was that it had been set out under an award, and that certain private persons had the right to use it, would have been of great weight with the jury in leading them to the conclusion, that there had been no dedication to the public. It seems to me, therefore, that we are deciding in the present case nothing inconsistent with that case.

ARCHIBALD, J., concurred.

Rule discharged with costs.

Attorneys for prosecution: *Pilgrim & Phillips, for Smith & Hinde, Sheffield.*

Attorneys for defendants: *Torr & Co., for Dransfield & Sons, Penistone.*

THE QUEEN *v.* GOODALL AND OTHERS, JUSTICES OF SUSSEX.

May 31.

Act as to Threats and Molestation (34 & 35 *Vict. c.* 32), *s.* 3—*Appeal—Costs against convicting Justices.*

Three labourers having been convicted by justices of an offence under the Act as to threats and molestation (34 & 35 Vict. c. 32), appealed to quarter sessions under s. 3, which enacts that any party aggrieved by a conviction made by a court of summary jurisdiction may appeal, subject to certain conditions: (2.) The appellant shall, within seven days after the cause of appeal arose, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and the ground of it. (5.) The Court of Appeal may make such order as to costs to be paid by either party as the Court thinks just. The appellants gave due notice to the prosecutor and to the convicting justices, and the justices, as well as the prosecutor, were named respondents in the appeal; but the justices did not appear. The quarter sessions quashed the conviction, and ordered the respondents, or some or one of them, to pay the appellants' costs. The appellants having brought up the conviction by certiorari, under 12 & 13 Vict. c. 45, s. 18, in order to enforce the payment of costs, a rule was obtained to quash so much of the order as ordered the justices to pay costs:—

Held, that the quarter sessions had no power to award costs against the convicting justices; and the Court made the rule absolute with costs.

CERTAIN justices of Sussex, in petty sessions at Worthing, on the 16th of April, 1873, convicted three labourers of the name

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of Newman, Leggart, and Cobby, on the information of G. Goodall, a builder, of molesting one of his servants, contrary to 34 & 35 Vict. c. 32, s. 1.

The defendants appealed to the quarter sessions, and gave to Goodall and the convicting justices the notice required by s. 3, subs. 2. (1)

The appeal, in which Newman, Leggart, and Cobby were named appellants, and Goodall and the three justices respondents, was heard at the midsummer sessions.

The convicting justices did not appear, either by counsel or in any other manner, and took no part whatever on the hearing of the appeal.

The quarter sessions quashed the conviction; and an order was drawn up, which stated that Newman, Leggart, and Cobby were the appellants, and that Goodall and the justices were respondents, and as such appeared by counsel at the hearing of the appeal, and it was ordered that the conviction be quashed, and that the respondents, or some or one of them, should pay the costs of the appellants.

This order was afterwards removed into this court, under 12 & 13 Vict. c. 45, s. 18, for the purpose of enforcing the payment of the costs.

A rule was then obtained, upon affidavits disclosing the above facts, calling upon the appellants to shew cause why so much of the order of quarter sessions as states that the justices were respondents in the said appeal, and as such appeared by counsel upon the hearing of the appeal, and also such part of the said order as awards and orders that the costs of the appellants should be paid by them or some or one of them, should not be quashed.

(1) By 34 & 35 Vict. c. 32, s. 3, Any party aggrieved by an order or conviction made by a court of summary jurisdiction on determining any complaint or information under this Act, may appeal therefrom, subject to the conditions and regulations following:—(1.) The appeal is to be to the quarter sessions holden not less than fifteen nor more than four months after the decision of the Court. (2.) "The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and of the ground thereof. . . . (5.) . . . The court of appeal may also make such order as to costs to be paid by either party as the court thinks just."

Willoughby shewed cause. The statute 34 & 35 Vict. c. 32, s. 3, subs. 2, requires notice to be given to the justices, and by that means brings them before the court of quarter sessions.

[BLACKBURN J. That enables the justices to appear if they chose, and at most they might be liable to pay costs if they did appear; but how does it make them respondents unless they appear?

QUAIN, J. Subs. 5 of s. 3 only enables the quarter sessions to make an order for costs to be paid by "either party." The justices are not made parties by the statute.

BLACKBURN, J. The case of *Reg.* v. *Davidson* (1) following *Rex* v. *Hants* (2), is directly in point.

COCKBURN, C.J. The order may have been drawn up per incuriam. Otherwise, it does appear a most outrageous proceeding for the quarter sessions to take upon themselves to visit convicting justices with costs. This Court does in some cases inflict costs on justices when they have been guilty of some gross impropriety in the exercise of their summary jurisdiction. But there is no pretence for saying the quarter sessions have any such power.]

McIntyre, Q.C. (with him *Grantham*), who appeared to support the rule, asked for costs.

PER CURIAM (Cockburn, C.J., Blackburn, Quain, and Archibald, JJ.): As the appellants removed this order under 12 & 13 Vict. c. 45, for the purpose of enforcing the costs, and so made it necessary for the justices to obtain the rule, and as the appellants have shewn cause against the rule, the justices ought to have their costs.

Rule absolute with costs.

Attorney for appellants: *Bury Hutchinson.*

Attorney for justices: *H. S. Willett, for M. Green, Worthing.*

(1) 24 L. T. (N.S.) 22.

(2) 1 B. & Ad. 654.

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June 10.

SWIFT *v.* JEWSBURY (P. O.) AND GODDARD.

Costs of Successful Defendant— Certificate to deprive Defendant of Costs under 3 & 4 Wm. 4, c. 42, s. 32—"Reasonable Ground"—Statement of Case on Appeal.

The plaintiff brought an action against G. for a misrepresentation made by him in his character of manager of a banking company, and joined as a defendant J., as the public officer of the company. At the trial a verdict was directed against both defendants, with leave to move to enter the verdict for J. The rule was obtained accordingly, but the Court of Queen's Bench held both defendants liable. A case was then stated on appeal in which the question for the Court was, whether defendant J., as public officer, was entitled to have the verdict entered for him. "If the Court shall be of opinion in the affirmative, then the verdict is to be entered for the said defendant, with costs of defence." The Exchequer Chamber (overruling the judgment of the Queen's Bench) directed the verdict to be entered for J. The plaintiff then applied to the judge who tried the cause, and he certified, under 3 & 4 Wm. 4, c. 42, s. 32, that the plaintiff had reasonable ground for making J. a defendant:—

Held, first, that the statement in the case was a mere conclusion of law, and could not be taken as an agreement by plaintiff not to apply for a certificate. Secondly, that the judge had power to certify where the question whether the plaintiff had reasonable cause was compounded of facts and a doubtful point of law; and his power was not confined to mere facts.

ACTION against Jewsbury, as public officer of the Gloucestershire Banking Company, and Goddard, for misrepresentation made by Goddard in his character of manager of a branch bank of the company. (1)

At the trial a verdict was directed against both defendants, with leave to move to enter the verdict for Jewsbury. A rule was obtained accordingly, and was afterwards discharged by the Court of Queen's Bench. On appeal, the Court of Exchequer Chamber; holding the defendant Jewsbury, as such public officer, not liable for the misrepresentation of the defendant Goddard, made the rule absolute to enter a verdict for the defendant Jewsbury. (1) The question for the Court was stated in the case on appeal: first, whether defendant Jewsbury, as such public officer, is entitled to have the verdict entered for him: "If the Court shall be of opinion as to the first question in the affirmative, then the verdict for the

(1) Ante, pp. 301, 305.

plaintiff against the defendant Jewsbury is to be set aside, and a verdict to be entered for him with costs of defence." (1)

After the judgment of the Exchequer Chamber had been given, the plaintiff applied to Cockburn, C.J., who tried the cause, for a certificate under 3 & 4 Wm. 4, c. 42, s. 32, that there was reasonable cause for making Jewsbury a defendant. (2) The Chief Justice granted the certificate, subject to appeal to the Court.

A rule was accordingly obtained to rescind the certificate.

Edward Clarke shewed cause. Two points are relied upon by the defendant. First, that the plaintiff is precluded by the statement in the case from asking for a certificate; secondly, that the certificate can only be granted as to facts, whereas here the defendant Jewsbury succeeded on a point of law. As to the first objection, it is clear that the statement at the end of the case is a mere conclusion of law, which the plaintiff could not object to. The plaintiff only consented at the trial that the point should be reserved generally as to the liability of the defendant Jewsbury. As to the second point, the present Act, 3 & 4 Wm. 4, c. 42, s. 32, is identical in terms, for this purpose, with the former Act, 8 & 9 Wm. 3, c. 11, s. 1; and under that statute, in *Aaron* v. *Alexander* (3), Lord Ellenborough, after a reference to the statute, granted a certificate, where a verdict for one of the defendants was directed on the ground that he was not liable in point of law.

Benjamin, Q.C., and *Anstie*, in support of the rule. The plaintiff is precluded by the statement in the case to which he has agreed from asking for a certificate. Secondly, the case is not within the Act. The power to certify is given to the judge who tries the case, and it must mean that he may certify to deprive the suc-

(1) In reporting the case in the Exchequer Chamber this statement was omitted by the reporter (ante, p. 306), as being, what the Court has now decided it to be, mere surplusage.

(2) 3 & 4 Wm. 4, c. 42, s. 32: "Where several persons shall be made defendants in any personal action, and any one or more of them . . . upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action." The 8 & 9 Wm. 3, c. 11, s. 1, was in similar terms, with the addition between "shall" and "certify" of the words "immediately after the trial in open court."

(3) 3 Camp. 35.

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cessful defendant of costs, if he is satisfied on the facts that the plaintiff had reasonable cause for making him a defendant. It has no relation to a question of law; every one must be taken to know the law, and the law being ascertained it is for the judge to say whether the plaintiff had reasonable cause on the facts. In this case, therefore, the Chief Justice had no discretion to exercise, and ought to have refused the certificate.

[ARCHIBALD, J. *Aaron* v. *Alexander* (1) is against that argument.]

MELLOR, J. This is an application to set aside a certificate of the Lord Chief Justice on the ground, first, that it was not within his discretion to grant it; secondly, that the plaintiff was precluded from asking for it by the terms of the statement in the case. I am clearly of opinion that we cannot inquire into the propriety of granting the certificate, unless it is shewn to be a case in which the judge had no power to interfere. With regard to the question whether the plaintiff was precluded, I was struck at first by the statement in the case, because I did not realise the fact that it was only a case stated on appeal, and not a case from the first stated by the consent of parties. So looking at the statement, it is clear that the plaintiff can never have intended to consent to more than he had consented to on the trial, viz. that the verdict, which had been directed for the plaintiff after all the facts were before the jury, should be entered for the defendant Jewsbury, if the Court thought that in point of law the defendant was entitled to it, and that judgment should be entered accordingly. This Court refused to disturb the verdict; but the Court of Exchequer Chamber reversed that decision, and directed the verdict to be entered for the defendant. That was the only judgment the Court of Exchequer Chamber was authorized to give. Costs follow, not as an act of the Exchequer Chamber, but by virtue of the statutes; and the plaintiff was in the same position as if the verdict had been originally entered for the defendant Jewsbury, upon which he would have asked the Chief Justice for a certificate to deprive the defendant of costs, on the ground that the plaintiff had a reasonable cause for making him a defendant. The Chief Justice gave his certificate, the matter being doubtful and one com-

(1) 3 Camp. 35.

pounded of law and fact. It is manifest that the plaintiff had reasonable ground for making Jewsbury a defendant from the opinion which this Court entertained that he was entitled to keep his verdict against both defendants. Therefore I am of opinion that on neither ground is the defendant entitled to have this rule made absolute.

LUSH, J. I am of the same opinion. I was at first struck with the argument that the statement at the end of the case amounted to an agreement on the part of the plaintiff not to ask for a certificate to deprive the defendant Jewsbury of his costs. But, on consideration, it is clear to me that those words were not introduced with any such intention. The leave reserved to enter a verdict for the defendant could only be by consent, and was simply to enter a verdict without more; so that the statement at the end of the case is mere surplusage, expressing what the effect of the Court of Exchequer reversing the judgment of this Court and directing the rule to be absolute to enter a verdict for the defendant would be. If this Court had entered the verdict for the defendant, it could not have been argued that the plaintiff could not have applied for and the judge could not have granted a certificate, inasmuch as the present statute purposely leaves out the words "immediately after the trial in open court," which occur in the former statute. This Court, however, upheld the verdict for the plaintiff against both defendants. The appeal must be in the form of a special case, and the alternative of what is to happen if the Court of Exchequer Chamber were of opinion in the affirmative is simple form, and merely expands the leave reserved, and only expresses what the formal judgment must be in the then state of the record. But inasmuch as the plaintiff is not precluded by the leave reserved from applying for a certificate if the judgment had been for the defendant in this Court, neither is he precluded after the Court of Error has pronounced the same judgment. There is no reason whatever suggested why the plaintiff should have bound himself not to ask for a certificate. As far, therefore, as the first point, it is clear that the plaintiff had a perfect right to ask for a certificate. Then, is it a case in which the judge could certify that the plaintiff had reasonable cause for making the public

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officer of the company a defendant? It was argued that reasonable cause must be reasonable cause having regard only to the facts, and that the plaintiff was bound to know the law, and however reasonable and well-founded it might be for him to make Jewsbury a defendant at the time he did so, yet as he had no ground in point of law after the law is declared, it is not a case in which the judge can certify. I cannot agree to that argument. It was intended that the judge should take into consideration all the circumstances under which the action was commenced; and the Chief Justice, therefore, was justified, after the inquiry, in saying that the plaintiff had reasonable cause—in other words, that it was not an oppressive or vexatious proceeding on the part of the plaintiff in making the public officer a party to the action. It was done on reasonable grounds, therefore the defendant shall not recover the costs of the defence.

QUAIN, J., concurred.

ARCHIBALD, J. I am of the same opinion. There was here no bargain that the plaintiff should not apply for a certificate. The case was stated only on appeal under s. 39 of the Act of 1854; it is not like a case originally and entirely stated by consent. The object of the case is simply for the convenience of the Court of Error that the parties shall agree to a certain state of facts, instead of the argument taking place on the reading of the judge's notes only; and the statement at the end of the case is really unnecessary, and is merely the statement of a conclusion of law. As regards the second point, it is argued that the statute means by "reasonable cause" reasonable cause simply as to facts. But that is not so; reasonable cause is a mixed question of facts and law applicable to the facts. Here it was a very doubtful question of law how far the company were bound by the statement of Goddard. The Chief Justice, therefore, if the verdict had been entered for the defendant Jewsbury at the trial, could have granted a certificate; and the plaintiff is entitled to be in the same position now.

PER CURIAM:

Rule discharged with costs.

Attorneys for plaintiff: *Harper & Co.*

Attorneys for defendant: *Waterhouse & Winterbotham,*

[IN THE EXCHEQUER CHAMBER.]

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June 13.

FOX *v.* CLARKE.

Conveyance of House—"House now in the Occupation of P."—Ornamental Frontage extending across adjoining House—Easement.

The plaintiff having agreed to purchase two adjoining houses, agreed to sell one to P., and by plaintiff's direction that house was conveyed, in 1858, to P. (and by P. in 1866 to the defendant) in fee, the description being, "all that dwelling-house now in the occupation of P., together with the walls belonging thereto." The houses were in a street, and were built up to the foot-pavement. On the front of defendant's house, adjoining the front of plaintiff's house, was a slight projection nine feet wide; in the middle of this was the doorway, three and a half feet wide, and on each side of the doorway was a pillar supporting a shallow portico; over the doorway was a window of the same width, and above that a string course and a pediment, all symmetrically placed on the nine-feet projection. Inside, the party-wall, dividing the two houses, instead of being coincident with the extremity of the nine-feet projection, was in a direct line with one side of this doorway, so that if the party-wall had been prolonged in a straight line to the street, two feet eleven inches of the width of the projection, which included part of the portico and of the pediment and the whole of one of the pillars supporting the portico, would have been on the plaintiff's side of that line; and on the inside these two feet eleven inches which, from the outside, appeared to be part of defendant's house, formed part of one of the rooms of plaintiff's house. The defendant having painted the two pillars, the portico, and the whole of the pediment, which were stucco, but had never been before painted, plaintiff brought an action of trespass, claiming as his the one pillar, the part of the portico, and the part of the pediment and string course over the pillar, all of which were on the plaintiff's side of the line marking the middle of the party-wall. On the above facts, the Court having power to draw inferences of fact:—

Held (reversing the judgment of the Queen's Bench), that the parts in question were parts of the defendant's house.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter the verdict for the defendant. (1)

Declaration for trespass in painting parts of the walls of plaintiff's house.

Pleas, inter alia, 2nd, that the said house and the said parts of the said walls were not plaintiff's as alleged; 3rd, that the parts of the said walls were the freehold of defendant.

Issue joined.

At the trial, before Blackburn, J., at the Suffolk Spring Assizes,

(1) Law Rep. 7 Q. B. 748.

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1872, it appeared that the plaintiff had become the purchaser in fee of two adjoining houses, Nos. 5 and 7, in Museum Street, Ipswich, and he had agreed to sell the southern house, No. 7, to R. M. Phipson; and by deed of the 13th of August, 1858, to which the plaintiff was a party, and which recited the plaintiff's agreement to purchase the two houses and his agreement to sell one to Phipson, the owners in fee, by direction of the plaintiff, conveyed to Phipson in fee "all that messuage or dwelling-house, with the garden thereto belonging, situate in the parish of St. Matthew, in Ipswich, lately in the occupation of Miss Gooch, now in the occupation of the said R. M. Phipson, together with the walls belonging to the said messuage and premises, and the walls bounding or dividing the said garden, except nevertheless that the wall dividing the said messuage from the said messuage in the occupation of Robert Charles Burton [being No. 5], and retained by the said John Fox [the plaintiff], is to be considered a party-wall, and to be enjoyed by the said John Fox and the said R. M. Phipson, and their respective heirs and assigns, and their respective tenants accordingly, and also subject as to the wall dividing the said garden hereby conveyed from the premises so retained by Fox to the use of the same by Fox, his heirs and assigns, and his and their tenants, in common with Phipson, his heirs and assigns, and his and their tenants" and (after further describing the back premises) "which said messuage and dwelling-house, garden walls, passages, and hereditaments are by way of further identity laid down and delineated on the map or plan thereof drawn in the margin of these presents. Together with all and singular the houses, outhouses, edifices, buildings, yards, gardens, rights, ways, paths, passages, waters, watercourses, liberties, privileges, covenants, profits, and commodities and emoluments whatsoever to the said messuage or dwelling-house hereby granted, belonging, or appertaining, or in any way reputed to belong or appertain, or held, occupied, or enjoyed with or as part of, parcel, or member of the same."

Phipson, by deed of the 2nd of January, 1866, reciting the above conveyance, conveyed the house and premises, &c., to defendant in fee.

The two houses formed part of a row of houses of uniform

elevation in Museum Street, built quite up to the foot-pavement, and on the front of the defendant's house adjoining the front of the plaintiff's house was a slight projection of two or three inches, nine feet in width. Symmetrically placed in the middle of this projection was the doorway, three feet and a half wide, and on each side of the doorway was a pillar supporting a shallow portico. Over the portico was a bedroom window, of the same width as the doorway, and over that was a pediment which extended a few inches over each side of the projection, and under the window was a string course, which also extended the whole width of the projection. (1) On the inside, however, the party wall dividing the defendant's house from the plaintiff's house, instead of being coincident with the end of the projection, was about two feet eleven inches more to the south, being in a direct line with the side of the doorway, so that on the inside, from two to three feet of that which appeared from the outside to form part of the defendant's house, formed part of the walls of one of the front rooms of the plaintiff's house. (2)

The plan attached to the conveyance to Phipson was a very small ground plan not drawn to scale. It shewed the bases of the two pillars, and on it the party wall was drawn in a line with the outside of the base of the pillar outside.

The action was brought for painting the pillar and the parts of the portico over it and of the string course and of the pediment, all of which were to the north or plaintiff's side of the middle of the party wall, and all of which the plaintiff claimed as part of his house, while the defendant claimed them as part of the house in the occupation of Phipson. The houses were of brick, but the pillars, pediment, &c., were of stucco; it did not appear that they had ever been painted before by any one.

The learned judge directed a verdict for the plaintiff on the second and third issues (the jury being discharged as to the others), with leave to move to enter the verdict on those issues for the defendant, if the Court, having liberty to draw inferences of fact, should be of opinion that on the evidence the defendant was entitled to the verdict.

A rule was obtained accordingly, which was afterwards dis-

(1) This appeared from a photograph which was put in evidence.

(2) This appeared from a plan put in.

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charged by the majority of the Court (Blackburn and Mellor, JJ.), Lush, J., dissenting. (1)

O'Malley, Q.C. (with him *Blofeld*), for the plaintiff.

Manisty, Q.C. (with him *Bulwer, Q.C.*, and *Graham*), for the defendant.

The arguments were the same as in the Court below.

Bramwell, B. I agree with the judgment of my Brother Lush; and should be content to read his judgment as the grounds of my decision. But I will put it on a more technical and shorter ground thus: the declaration says that the defendant painted part of the plaintiff's house; and the defendant says it was not part of the plaintiff's house; and it was for the plaintiff to make that out. To my mind, he clearly has not done so. As to the pillar, I cannot see what possible ground there is for saying it is part of the plaintiff's house, except that it is built in front of part of it. If there were some invariable rule of law or physical objection to the front of one house extending beyond the interior of another, there might be something in the case for the plaintiff, but no such reason exists. It is quite open to a man to build one house overlapping the other. But then it is said, although this may be true as to the pillar and portico, it is not true as to the string course and pediment, which are part of the outer wall of one of the rooms of the plaintiff's house. It is impossible, when one looks at the photograph, to say that one part of the portico belongs to the defendant and the other does not; but then the plaintiff says the string course and pediment cannot have an independent existence, and are dependent for support upon the wall which the plaintiff says is his. But it appears to me that the plaintiff is in this dilemma. Either the projecting part of the wall belongs to the plaintiff alone, or to the plaintiff and defendant, or to the defendant alone; but if it belongs to the plaintiff alone, then the defendant has an easement and the right of support to the pediment which depends upon the plaintiff's wall for support. There is no difficulty as to this. The law as to the disposition of two tenements by which a right of way or any other easement may be created applies to the case. Here the disposition was by the owner of the plaintiff's and

(1) Law Rep. 7 Q. B. 748.

defendant's houses. In either point of view, therefore, the plaintiff has not succeeded in shewing that the defendant committed a trespass and painted part of the plaintiff's house. What the defendant painted was, I think, no part of the plaintiff's house, but was the defendant's. My Brother Blackburn at the close of his judgment says, "What I base my judgment upon is this, that if the house occupied by Mr. Phipson meant those parts he used and enjoyed internally, with the external walls that protect them, then the parts of the adjoining house, the frontage walls which protect the plaintiff's house, did not pass or cease to be the plaintiff's merely because they are external ornaments apparently belonging to the defendant's house; they remain the plaintiff's, as external parts of his house." (1) That seems to assume that the parts of the defendant's house which project beyond the plaintiff's house and depend for continuance on the plaintiff's house cannot be part of the defendant's house. I have already shewn that there is no such rule of law. The judgment must be reversed.

KEATING, J. I am of the same opinion. No doubt, whichever way the case is decided, it involves possible points of considerable difficulty on both sides, as to what the plaintiff can do, or is prevented from doing, and, vice versâ, the defendant, by either construction; but I entirely agree with the judgment of my Brother Lush in the Court below. The question turns upon whether this projection is part of the house which was conveyed by the deed of 1858. At that time the buildings were in the same state as now, and the defendant's house is described as "the house now in the occupation of Mr. Phipson." Drawing the inference which we are entitled to draw from the state of the premises, no doubt, under that description, that would pass which the photograph represents as the house occupied by Phipson. In the original structure the projecting part must have been placed on the flat surface of the wall which forms the outside of the plaintiff's house. Is there anything, in point of law, that prevents the projecting part from passing as part of the defendant's house, if it is sufficiently clear that it was intended to pass by the parties to the deed? I can see nothing to prevent it, simply

(1) Law Rep. 7 Q. B. at p. 753.

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because a part happens to overlap a part of the plaintiff's house. Now were the projections intended to be conveyed as part of the house? This is a question of fact to be decided by the true position of the premises, unless there is something contradicting or inconsistent with the description in the deed of "all that messuage or dwelling-house lately in the occupation of Miss Gooch; now in the occupation of the said R. M. Phipson, together with the walls belonging to the said messuage and premises." By that did the plaintiff intend to retain to himself that part which overlaps his front room? I think not. I think it had become part of the structure of the house occupied by Phipson. That is the view of my Brother Lush; and I confess I have not heard anything to convince me that it is not perfectly sound.

Brett, J. The question is, what is the construction to be put on the conveyance taking it with relation to all the facts that existed at the time. There were two houses, both belonging to the same parties; there was a vertical party wall at right angles to the front, and the apparent front of the defendant's house goes beyond this vertical party wall; so that about two feet and a half in width of this projection of a few inches, were, in fact, opposite to and formed the outer wall of part of the plaintiff's house. That was the state of facts. How is the deed to be interpreted which professes to pass "the house occupied by Phipson with the walls belonging thereto?" I think, on the true construction, it passed to the defendant what may be called the house proper and a right in this projection as a common right of wall between him and the plaintiff. That is, it is to be taken as a party wall belonging both to the plaintiff and defendant, so that neither can pull down or substantially alter it to the injury of the other.

Cleasby, B. It is unfortunate, where two persons make a deed with a plan, that the plan should not shew conclusively what was intended to pass. The right of the plaintiff and defendant must depend on the proper construction to be put upon the parcels, which must be looked at in connection with the plan and the state of facts then existing. Now the conveyance is of the house now in Phipson's occupation, together with the walls

belonging thereto. Everything that could be fairly called the house would pass under this; and, as far as the plan is concerned it does not shew this projection; but the conveyance goes on to say, "together with all the walls," which certainly would seem to extend to this projection.

Amphlett, B. I agree, and for very much the same reasons as those given in the judgment of my Brother Brett. In construing this deed you must suppose the parties had the houses before them. And as to the external elevation, it would appear clear that the whole façade, including the projecting parts in question, belonged to the defendant's house; but then on going inside they would find that part of the projection overlapped the plaintiff's house. The conclusion to be drawn would be that they intended the whole outside of what may be called the architectural elevation to go to the defendant, and the inside, which is overlapped, to remain in the plaintiff. To whom does the disputed wall belong? It answers two purposes—to support the defendant's portico, &c., on the outside, and so complete the architectural elevation of his house; and on the inside it answers the purpose of protecting the plaintiff's room. That wall, therefore, is the common property of the plaintiff and defendant, to be dealt with by each party for the purpose to which it was intended to be used by him. If a fire were to happen and the whole of the two houses were burnt down, the rights of the parties would remain the same, and the wall would have to be rebuilt precisely in the same position. There might be some difficulty to decide whether the site of the wall belonged to one or the other. Probably it belongs to the plaintiff; but that is immaterial, because at least the use of the wall for the purpose of the external elevation did pass to the defendant.

Judgment reversed.

Attorneys for plaintiff: *White, Borrett, & White, for Westhorp, Ipswich.*

Attorney for defendant: *J. Crowdy, for Aldous & Pearce, Ipswich.*

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June 13.

[IN THE EXCHEQUER CHAMBER.]

HUTTON AND ANOTHER *v.* BULLOCH AND OTHERS.

Undisclosed foreign Principal—Authority of English Merchant when buying Goods on Account of foreign Constituents—"Purchases" to be made on "joint Account" of English and foreign Firms.

H. F. & Co. were merchants in London, and defendant was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by plaintiff to H. F. & Co., on their order, given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should "purchase" and send out goods on "the joint account" of the two firms, 2 per cent. to be charged on the invoice by the London firm, and 5 per cent. by the Rangoon firm, including guarantee. Plaintiff had no knowledge of defendant, or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied:—

Held (affirming the judgment of the Queen's Bench), that defendant was not, as an undisclosed principal, a party to the contract under which the goods were supplied by plaintiff: for that, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract and pledge their credit with the English suppliers of the goods; inasmuch as the presumption, that foreign constituents do not give the English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account, applies to such a case.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendants on a special case.

The facts are sufficiently stated in the head-note, and are fully given in the judgment of the Court below. (1)

Sir H. James, Q.C. (with him *C. Bowen*), for the plaintiffs, referred to *Armstrong* v. *Stokes* (2); *Elbinger Co.* v. *Claye* (3); Lord Cranworth's opinion in the House of Lords in *Cox* v. *Hickman.* (4)

Sir J. B. Karslake, Q.C. (with him *Milward, Q.C.*, and *W. Williams, Q.C.*), for the defendants, was not heard.

BRAMWELL, B. We think that this judgment ought to be affirmed. The question really turns entirely upon the construc-

(1) Law Rep. 8 Q. B. 331.
(2) Law Rep. 7 Q. B. 598.
(3) Law Rep. 8 Q. B. 313.
(4) 9 C. B. (N.S.) at p. 90.

tion to be put upon these letters. I do not think I can state it more shortly than it was stated by my Brother Blackburn in the Court below. But before going to the consideration of those letters, I should like to observe—and I think it is fair that I should do so with a view to the construction of these letters—that it is eminently improbable that the defendant Bulloch should have authorized the London firm to pledge his credit so as to make him a party to the contracts with the plaintiffs for the purchase of the goods which were to be sent out to Rangoon to him; and eminently improbable that he should do so on account of the extreme inconvenience (he being at that distance) of his being made a party to such contracts; and in that sense the reasoning in *Armstrong* v. *Stokes* (1) is to a great extent applicable. Having made that prefatory remark, I will read what my Brother Blackburn said in the Court below, for, as I said before, I do not know that I can shorten it in any way: "We think the fair construction of the letters is, that the London firm were to purchase the goods and charge commission just as if the goods were consigned outwards on the sole account of the Rangoon firm; but that the consignment outward should be for their joint account. This was not intended to alter in any way the mode in which the purchase of the goods was to be effected; which was to be by the London firm on the best terms they could obtain, by a contract between them and the suppliers of the goods to which the foreign Rangoon house was not to be a party, though the London firm had agreed to appropriate the goods to exportation on joint account when purchased. This we think consistent with the general usage of trade." (2) My Brother Blackburn says that, and I agree this is consistent with the general usage of the trade. One word more upon this head. Sir Henry James's argument has really turned entirely upon the particular words used, "All purchases at Manchester and Glasgow shall be on joint account," which, he argues, means that the purchases were to be on the joint account, so that the Rangoon house should be made a party to each purchase. That cannot be the literal meaning, because it is quite certain that all purchases of goods at Manchester and Glasgow were not to be on joint account, for it is manifest that the

(1) Law Rep. 7 Q. B. 598. (2) Law Rep. 8 Q. B. at p. 336.

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writer of that letter was still contemplating that he would be purchasing with a view to shipments to Ceylon; therefore that must be understood otherwise than in the literal way that has been suggested, and must mean "that such goods as we purchase at Manchester and Glasgow, and either export to you, or destine to you, or appropriate to you," or some such word as that—in short, "for our Rangoon adventures, all goods purchased at Manchester and Glasgow shall be on joint account." That that is so, appears from the reply of the same writers to the answer of Halliday, Bulloch, & Co., because they say, "We note that our *outward* business is to be *on joint account*," using the identical expression, and really it would be a very strong thing indeed to say that the use of those words "all purchases of goods shall be made on joint account," gives rise to a different liability in these defendants than if the words had been as in the last letter, "our outward business is to be on joint account." Therefore, I entirely agree with what my Brother Blackburn says as to the construction of these letters.

Then there is a point made in this Court—I do not know whether it was made in the Court below—which seems to me to be really the same point differently put. The point is, that there was a partnership between the London house and the Rangoon house on each of these joint adventures. If there was anything joint in the nature of the transaction, I do not think that partnership is the correct expression, it is a joint interest; but whatever it is, it does not, to my mind, commence until after the purchases. It does not exist at the time of the purchases so as to make the London house purchasing partners on behalf of themselves and the others. It is an interest which, as far as it is joint, comes into existence afterwards. Therefore it was really very much the same point differently stated, and it does seem to me it is impossible to say this is the ordinary case of a partnership. Not looking at the moment to the particular words, see what it is. Halliday, Fox, & Co. are to get goods on as good terms as they can; they are to charge commission; they are to send them to Rangoon; the defendants are to sell them there, to charge commission, and if any profits are made afterwards, or any losses, they are to be divided between the London and Rangoon houses. It is joint interest in a sense, no doubt, but certainly not

a partnership, so as to make the defendants liable as the original purchasers of the goods. It has been said by Sir Henry James, "the guarantee is not inconsistent with a partnership." No, not necessarily inconsistent with it. But, undoubtedly, if I guarantee to another that there shall be no loss on such and such a transaction, and I also guarantee the commission, it is not evidence of partnership. These things do not ordinarily occur in ordinary partnership connections, therefore they may be put all on one side for that purpose. It seems to me, therefore, that there is no partnership making the defendant liable on the original purchase as a joint contractor with the then purchasers. I think, therefore, on both points the judgment should be affirmed.

KEATING, J. I am also of opinion that this judgment should be affirmed. The case seems to me to come within a narrow compass. There can be no doubt that Bulloch cannot be made liable unless he was a party to the contract on which the goods were purchased: and the simple question is, whether this correspondence shews that Bulloch had made himself a contracting party in the contract with the plaintiffs. Now, no doubt there are expressions in this correspondence which shew that there was to be a joint interest in these goods, but I cannot find that there is anything in the correspondence to shew that it ever was intended by the Rangoon house that they should be parties to any contract for the purchase of the goods. It is true that when the goods were purchased and shipped, or perhaps appropriated, they would be jointly interested in the proceeds of those goods, or in the goods themselves: but I have not discovered anything in this correspondence to shew that they intended to become joint contracting parties in the purchase of the goods. Everything in the relation of the parties is against that supposition; because although no doubt a foreign principal or a foreign house may make themselves parties with the house here so as to bind them all, yet the inconvenience of so doing, which was so well pointed out by my Brother Blackburn in the Court below, must, I think, strike everybody. The presumption is, that the foreign principal does not intend that the agent employed in London shall make him a party to the contract to purchase these goods. I see nothing in

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this case to vary that general principle, and I entirely agree with my Brother Bramwell, and also with the judgment of my Brother Blackburn, that really the correspondence all tends to shew that there was not any liability on the part of the defendant Bulloch, or his firm, with reference to the contract to purchase these goods. Therefore I think the judgment should be affirmed.

BRETT, J. If the plaintiffs could have proved that there was a contract of partnership existing between the Rangoon house and the English house, either before or at the moment of the contract with them, the plaintiffs, then I think Halliday, Fox, & Co. would thereby have had the authority to bind Bulloch and the Rangoon house to the contract. Whether there was such a contract depends on the intention expressed in the correspondence between the Rangoon house and the English house. It seems to me that there is no such intention expressed, because there was to be no joint interest, in my view of this correspondence, in anything until a time subsequent to the contract for purchase in England, namely, at the time when the goods, having been purchased in England by Halliday, Fox, & Co., were destined to the joint adventure which was carried out in the East. If there was no partnership, either before or at the moment of the contract with the plaintiffs, then the question is, whether Bulloch authorized Halliday, Fox, & Co. to bind him to the particular contract with the plaintiffs. In my opinion he would do so if he so intended and so expressed himself to Halliday, Fox, & Co., or if he authorized Halliday, Fox, & Co. to do acts which in ordinary course would not be done without binding him to the contract. Here he did not intend to authorize them to bind him to the contract, and did not so express himself, and he did not order them to do acts which in ordinary course would bind him to the contract. And why? Because he, Bulloch, was a foreign merchant abroad dealing in England through an English correspondent or agent here. In such cases it is now settled that it is not in ordinary course for the foreign merchant to authorize the English merchant to bind him to the English contract.

CLEASBY, B. I am quite satisfied myself that the defendants were not parties to the contract which was made with the plaintiffs.

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I will not go over the grounds which have been already stated, but there are others which make me see clearly that the contract which was made by Halliday, Fox, & Co. was not of that nature. The details of each transaction and the account sales put in shew that there was no intention that the original contract of purchase should be on the joint account.

Judgment affirmed.

Attorney for plaintiffs: *Kearsey.*
Attorneys for defendants: *Hollams, Son, & Cowell.*

CORY AND ANOTHER *v.* PATTON.

July 6.

Marine Insurance—Initialing Slip subject to Ratification—Policy—Concealment of Facts material to Risk.

Where underwriters have, by initialing a slip, made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is, nevertheless, in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honour and good faith, whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed. And it makes no difference that, the insurance being negotiated by an agent of the assured, the slip was initialed subject to the ratification of the assured.

So *held*, on the latter point, on the authority of *Hagedorn* v. *Oliverson* (2 M. & S. 485).

DECLARATION upon a policy of insurance whereby plaintiffs by their agents caused themselves to be insured, lost or not lost, at and from Blythe to Port Said, upon any kind of goods or merchandizes; and also upon the furniture of the ship *Ceylon*. Averments that defendant subscribed the policy for 80*l.*, that the goods were shipped and were by the perils insured against wholly lost.

Plea (amongst others), that at the time of making the policy of insurance plaintiffs concealed from defendant a fact then known to plaintiffs and not known to defendant and material to the risk, that is to say, that the ship having set sail and departed on the voyage with the goods on board met with an accident and misfortune while proceeding on the voyage.

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Replication: That before plaintiffs had any knowledge of the material fact, they, being at a distance from defendant, by a letter written by them to their agent, instructed their agent to effect the insurance, and plaintiffs had no knowledge of the material fact until after the lapse of a reasonable time for their agent to agree with underwriters to insure the goods, and to settle with them the terms and premium on and for which the insurance should be effected; and that in the ordinary course of business their agent ought to have agreed and settled as aforesaid before plaintiffs knew of the material fact; and that before they knew the fact the agent did apply to defendant as such underwriter to insure the goods, and settled and arranged with defendant the terms and premium on and for which defendant would insure the same; and defendant made a parol agreement with the agent to insure the same on those terms and for that premium, and became in honour, conscience, and good faith, though not in law, bound to subscribe a policy for insuring the goods on those terms and for that premium; and that if the material fact and plaintiffs' knowledge of it and premises as aforesaid had afterwards been made known to defendant he would still in honour, conscience, and good faith, have been bound to subscribe and bind himself by such a policy as aforesaid; and the plaintiffs knowing, as the fact was, that in due course of business at the time when they first had knowledge of the said material fact, either a policy for insuring the goods in pursuance of their instructions would be effected, or that such an agreement would be made by some underwriter or underwriters which would in honour, conscience, and good faith, bind him or them to subscribe a policy for effecting the insurance, did in good faith abstain from communicating the material fact to their agent or to defendant, which is the concealment mentioned.

Issue joined. (1)

At the trial before Cockburn, C.J., at the London sittings after Trinity Term, 1872, it was proved that the plaintiffs, merchants at Cardiff, being desirous of insuring a cargo of coals shipped on the *Ceylon* on a voyage from Blythe to Port Said, on the 19th of April, 1870, wrote to their insurance broker in London to effect

(1) The pleadings are set out in full in the report of the argument of the demurrer, Law Rep. 7 Q. B. 304.

the insurance, limiting the premium to 30*s.* a ton. The broker made out a slip and took it to one Rutherford, the defendant's agent, who refused to initial it at a less premium than 35*s.* a ton, to which the broker assented. The broker shewed Rutherford the plaintiffs' letter of the 19th of April, and the slip was initialed by Rutherford subject to approval. The plaintiffs did in fact ratify what their broker had done, and the defendant signed the policy at 35*s.* Between the time of initialing the slip and signing the policy the plaintiffs became aware of the loss of the *Ceylon*, and did not communicate that fact to the defendant. Rutherford was called as a witness and stated the practice at Lloyd's to be that "if an agent agrees to give a higher premium than his instructions warrrant and the underwriter initials knowing this, if the principal ratifies, the underwriter is bound."

The jury found that by the custom at Lloyd's an underwriter, who agrees to take a risk at a premium exceeding the limit given by the principal to his broker, subject to approval, binds himself to take it under all circumstances, provided the principal ratifies. And a verdict was entered for the plaintiffs for 80*l.*, leave being reserved to the defendant to move to enter a nonsuit.

A rule was obtained accordingly, on the ground that the custom found by the jury was not sufficient in law to support a verdict for the plaintiffs, and that upon the whole case there was no evidence to support the replication or any amended replication.

May 5. *Hugh Shield* shewed cause.

H. Matthews, Q.C., and *W. Williams, Q.C.*, in support of the rule.

The following cases were cited in the course of the argument: *Ridgway* v. *Wharton* (1); *Routledge* v. *Grant* (2); *Cooke* v. *Oxley* (3); *Bird* v. *Brown.* (4)

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Blackburn, Quain, and Archibald, JJ.) was delivered by

COCKBURN, C.J. This was an action on a policy of insurance on

(1) 6 H. L. C. 238.
(2) 4 Bing. 653.
(3) 3 T. R. 653.
(4) 4 Ex. 786; 19 L. J. (Ex.) 154.

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goods. The plaintiffs, who are colliery owners and merchants at Cardiff, having had a cargo of coals shipped on their account on board the ship *Ceylon* by their agents at Newcastle, wrote on the 19th of April, 1870, to Patton & Co., insurance brokers in London, to effect an insurance thereon, limiting the amount of premium to 30*s.* a ton. The brokers' clerk thereupon proceeded to Lloyds and saw one Rutherford, who was in the habit of underwriting for the defendant, and whose authority was not disputed, and on Rutherford refusing to insure the cargo at less than 35*s.* a ton, agreed to give that amount of premium, whereupon Rutherford initialed the slip. It did not appear that the broker had a discretionary authority to exceed the limits prescribed by the plaintiffs as to the amount of premium; and it must be taken that the slip was initialed subject to the ratification of the plaintiffs, more especially as in this instance the letter of the plaintiffs to the broker was shewn to Rutherford, who thereupon, according to his own account, initialed subject to approval. By the practice of Lloyds, as stated by Mr. Rutherford in evidence, "if an agent agrees to give a higher premium than his instructions warrant, and the underwriter initials knowing it, if the principal ratifies, the underwriter is bound." The plaintiffs in the present case did in fact ratify what their brokers had done, and if this were all the case would be free from difficulty. But it so happened that between the time of initialing the slip and the signing of the policy, namely, on the afternoon of the 20th of April, the plaintiffs became aware of the loss of the *Ceylon*, but failed to communicate that fact to the defendant.

The case came before the Court on demurrer (1); but as the facts then stood on the record, the fact that the slip was initialed subject to ratification by the assured was not before the Court. Upon the facts as then appearing on the record, this Court gave judgment in favour of the plaintiffs, on the ground that, according to the usage of those engaged in marine insurance, the initialing of the slip constitutes a complete and final contract, binding upon them in honour and good faith, whatever events might subsequently happen; and that consequently the assured need not communicate to the underwriter facts material to the risk insured against, which came to his knowledge between the time of initialing the slip and

(1) See Law Rep. 7 Q. B. 304.

that of signing the policy; and the only question now before us is whether the fact, appearing on the trial, that the slip was initialed subject to ratification by the assured, constitutes a material difference from the facts as appearing on the record when the former judgment was given, and, by reason that the contract was still open as was contended on the argument before us, entitled the underwriter to have the loss communicated to him. Upon this point we have entertained considerable doubt, but as the case of *Hagedorn* v. *Oliverson* (1) appears to us to be in point and to govern the present case, we think ourselves bound to abide by that decision, leaving the defendant to take the case to a court of appeal if he shall be so advised.

Rule discharged.

Attorneys for plaintiffs: *Ingledew, Ince, & Greening, for Ingledew, Ince, & Vachell, Cardiff.*

Attorney for defendant: *J. MacDiarmid.*

DUDGEON AND OTHERS *v.* PEMBROKE.

July 6.

Marine Insurance—Time Policy—Implied Warranty of Seaworthiness—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 118—*Certificate that Ship is fit to carry Passengers—Illegal Act of Master—Privity and Liability of Owner.*

If a master of a vessel which has not obtained a certificate enabling her to carry passengers does carry them without her owner's knowledge, her voyage is not rendered, by s. 318 of the Merchant Shipping Act, 1854, illegal, so as to vitiate a policy effected by her innocent owner.

Cunard v. *Hyde* (2 E. & E. 1; *Wilson* v. *Rankin* (Law Rep. 1 Q. B. 162), followed.

If a vessel sails on a voyage in an unseaworthy state, and she is lost by reason of her unseaworthiness during a storm, the perils of the sea must be considered the proximate cause of the loss.

In an action upon a time policy, if it be proved that the vessel insured had been sent to sea in an unseaworthy state, her owner not knowing that she was unseaworthy, and was lost by the perils insured against owing to her unseaworthiness, the owner can recover for her loss.

Thompson v. *Hopper* (6 E. & B. 172, 937); *Fawcus* v. *Sarsfield* (6 E. & B. 192) followed and commented on.

DECLARATION against the defendant, as underwriter on a time policy for twelve months from the 24th of January, 1872, on a

(1) 2 M. & S. 485.

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steamer called the *Frances:* on ship valued at 8000*l.* and machinery at 4000*l.*, claiming a total loss.

Pleas, amongst others: 3. That the ship was not lost by the perils insured against; 4. Misrepresentation of facts material to the risk; 5. Concealment of material facts known to the plaintiffs, and of which the defendant was ignorant.

6. That after the making of the policy of insurance, the plaintiffs, well knowing that the ship was wholly unseaworthy, wrongfully and improperly, and without any justifiable cause or reason, caused and ordered her to proceed from the port of London in such wholly unseaworthy condition on the voyage on which she was afterwards lost; and the ship remained, as the plaintiffs always well knew, in such wholly unseaworthy condition from the time she left the port until she was lost; and the ship and machinery were lost by reason of such unseaworthiness of the ship and not otherwise.

7. That the ship was before and at the time of the making of the policy, and up to the time of the loss, a passenger steamer within s. 318 of the Merchant Shipping Act, 1854 (1); and after

(1) By s. 109 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the owner of every passenger steamer shall cause the same to be surveyed by a shipwright surveyor and by an engineer surveyor, and such surveyors shall give to the owner declarations containing certain particulars as to the hull and equipment of the vessel and of her machinery. By s. 110, the owner shall transmit such declarations to the Board of Trade. By s. 112, upon receipt of the declarations, the Board of Trade shall cause a certificate in duplicate to be issued to the effect that the provisions of the law with respect of the ship and the transmission of declarations have been complied with . . . and the certificate shall also contain a statement of the number of passengers which according to the declaration of the shipwright surveyor such ship is fit to carry.

By s. 318, "It shall not be lawful for any passenger steamer to proceed to sea or upon any voyage or excursion with any passengers on board, unless the owner thereof has transmitted to the Board of Trade the declarations hereinbefore required, or unless the owner or master thereof has received from such board such a certificate as hereinbefore provided for, such certificate being a certificate applicable to the voyage or excursion on which such ship is about to proceed; and no officer of customs shall grant any clearance or transire for any passenger steamer unless upon the production of such certificate as aforesaid . . . and if any passenger steamer attempts to ply or go to sea without such production, any such officer may detain her until such certificate is produced; and if any passenger steamer plies or goes to sea with any passengers on board without having one of the duplicates of such certificates as aforesaid . . . so put

the making of the policy of insurance, and before the alleged loss, the ship was sent by the plaintiffs, being the owners of the ship, with passengers on board, on a certain voyage, and proceeded to sea on such voyage, being the voyage on which the ship, machinery, and premises were lost as alleged, without the owners of the ship having transmitted to the Board of Trade the declarations required in that behalf by the provisions of the statute, and without the owners or master of the ship having received from such board such a certificate as is provided for by the provisions of the statute in that behalf; and the plaintiffs, as the owners of the ship, had not nor had the master of the ship ever received any such certificate before the time of the alleged loss, up to which time the passengers had from the commencement of the voyage remained and continued on board the ship, all which several premises the plaintiffs always well knew, and by reason of the premises the voyage became and was illegal, and that the plaintiffs caused the policy to be made for the express purpose of covering the ship and machinery and indemnifying themselves against the loss thereof on the illegal voyage.

Issue was joined on all the pleas.

Demurrers to the sixth and seventh pleas and joinder in demurrer.

At the trial before Blackburn, J., at the London sittings after Trinity Term, 1873, the judge left certain questions to the jury, and on the answers to those questions directed the verdict to be entered for the plaintiffs on the third and sixth pleas. (1)

A rule was afterwards obtained by the defendant to shew cause why the verdict entered for the plaintiffs should not be set aside, as regards the verdict entered on the sixth plea, on the ground that the findings of the jury did not warrant the entry of such verdict; and as regards the third plea, on the ground that there was no finding to warrant the entry of such verdict; and why a verdict should not be entered for the defendant instead of the verdict for the plaintiffs; or why a new trial should not be had

up as aforesaid in some conspicuous part of the ship, the owner thereof shall for such offence incur a penalty not exceeding 100*l.*, and the master of such ship shall also incur a further penalty not exceeding 20*l.*"

(1) See post, p. 591.

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between the parties on the ground that the findings of the jury on the questions submitted to them were against the weight of evidence, and that their findings are inconsistent and incomplete, and insufficient to warrant the entry of the verdict or otherwise.

The Court ordered that the demurrer should come on for argument with the rule when the evidence (1) as to the finding as to the seventh plea should be considered.

May 28, 29; June 2. *Milward, Q.C., Watkin Williams, Q.C.,* and *A. L. Smith,* shewed cause against the rule, and argued in support of the demurrers.

Sir J. B. Karslake, Q.C., Butt, Q.C., and *Cohen, Q.C.,* in support of the rule and in support of the pleas.

On the argument of the demurrer to the seventh plea the following cases were cited: *Redmond* v. *Smith* (2); *Sewell* v. *Royal Exchange Association* (3); *Cunard* v. *Hyde* (4); *Wilson* v. *Rankin.* (5)

On the other points the following cases and authorities, in addition to those mentioned in the judgment, were cited in shewing cause against the rule: *Gibson* v. *Small* (6); *Russell* v. *Thornton* (7); *Ionides* v. *Universal Marine Insurance Co.* (8); *Livie* v. *Janson* (9); *Dixon* v. *Sadler.* (10)

In support of the rule: *Hagedorn* v. *Whitmore* (11); *Green* v.

(1) The evidence on this part of the case was, that as it would have been necessary to detain the *Frances* in order that the Board of Trade surveyors might survey her preparatory to granting a passengers certificate, and the plaintiffs were desirous of despatching her at once, they sent her to sea without such certificate, informing the master of the circumstance, and that he was not to receive passengers on board. The master, however, at Gottenburg advertised the ship in the Swedish newspapers as a passenger ship, and received on board two persons to be conveyed to England. He did this without the knowledge or consent of the plaintiffs, who alleged that they did not receive the passage-money. The jury found: 1. That the two persons were not passengers. 2. That the plaintiffs did not intend that the ship should carry passengers.

(2) 7 M. & G. 457.

(3) 4 Taunt. 856.

(4) 2 E. & E. 1; 29 L. J. (Q.B.) 6.

(5) Law Rep. 1 Q. B. 162.

(6) 4 H. L. C. 353.

(7) 4 H. & N. 788; 29 L. J. (Ex.) 9; in error, 6 H. & N. 140; 30 L. J. (Ex.) 69.

(8) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.

(9) 12 East, 648.

(10) 5 M. & W. 405.

(11) 1 Stark. 157.

Emslie (1); *Hahn* v. *Corbett* (2); *Montoya* v. *London Assurance Co.* (3); *Palmer* v. *Naylor* (4); *Bondrett* v. *Hentigg.* (5)

The facts of the case and the arguments sufficiently appear in the judgment of the Court.

BLACKBURN, J. On the demurrer to the seventh plea we can give our judgment at once, but we will take time to consider the other points that have been argued. The later case of *Cunard* v. *Hyde* (6) decided that where a deck cargo was put on board with the privity of the owner whereby the object of an Act of Parliament was defeated, and whereby the vessel sailed upon an illegal voyage, a plea stating these facts would be a good defence to an action on the policy. The jury in the present case have found that the persons received on board were not passengers. I think in this the jury were wrong. They also found that it was not the intention of the plaintiffs that the ship should carry passengers. The question, then, is, whether the act of the master, by which he incurs a penalty, in taking passengers on board without the knowledge of the plaintiffs, the shipowners, makes the voyage illegal so as to vitiate the policy of insurance. I think, on the authority of *Wilson* v. *Rankin* (7) and *Cunard* v. *Hyde* (8), the plea would be bad unless it alleged knowledge on the part of the shipowner, and here the jury have in effect negatived knowledge. There will, therefore, be judgment on the demurrer for the defendant, but the verdict on the plea must be entered for the plaintiffs.

QUAIN, J. I am of the same opinion. Where the object of an Act of Parliament is to prohibit a voyage, the illegality attaching to the illegal voyage attaches also to the policy covering the voyage. The law on the subject is stated in Duer, Lect. 3, § 50, p. 360, thus: "It is not in all cases that a breach of a statutory provision by the owners or master of a vessel, even when it induces a forfeiture, by a necessary consequence, avoids the insurance. Its

(1) 1 Peake, 212.
(2) 2 Bing. 205.
(3) 6 Ex. 451; 20 L. J. (Ex.) 254.
(4) 10 Ex. 332; 23 L. J. (Ex.) 324.
(5) Holt, N. P. C. 149.
(6) 2 E. & E. 1; 29 L. J. (Q.B.) 6.
(7) Law Rep. 1 Q. B. 162.
(8) E. B. & E. 670; 27 L. J. (Q.B.) 408.

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influence upon the contract depends on the nature, consequences, and design of the prohibition. We have seen that an illegal traffic is never permitted to vitiate a contract unless it occur in the course of the voyage insured, or of an entire voyage of which that insured is a component part. By parity of reasoning, the statutory provision, the breach of which discharges the insurers, must bear a direct and immediate relation to the voyage insured. It must operate either by its terms or by a necessary inference, as a prohibition of the voyage. Where no such connection subsists between the actual voyage and the provisions of the statute; where, consequently, the relation between the illegal act and the policy is not direct, but remote and incidental, so that neither the design or tendency of the latter is to aid or promote the commission of the former, the validity of the contract is not impaired or affected. In each of the cases that have been cited the statutory provision alleged to be violated bore a direct relation to the voyage insured. It was in effect a prohibition of the voyage, unless performed with the crew or master that the law required. Hence, the insurance shewed of necessity the illegality of the voyage to which it referred." In the present case the statute (s. 318) renders it unlawful for any passenger steamer to proceed to sea with any passengers on board, unless the master has received from the Board of Trade a certificate. The averments in the plea bring the case within s. 318: it alleges the vessel was sent by the plaintiffs, the owners of the ship, to sea with passengers on board without a certificate. The plea is therefore good, but a material part of it was not proved, that the ship was sent by the owners on the voyage with passengers. The owners had no intention that the vessel should carry passengers, and the master had no authority to do an illegal act and carry passengers on board the vessel. The verdict entered on the seventh plea for the plaintiffs must stand. We will take time to consider the other points.

Cur. adv. vult.

July 6. The judgment of the Court (Blackburn and Quain, JJ.) was delivered by

BLACKBURN, J. This was an action against an underwriter on a time policy for twelve months from the 24th of January, 1872, on

the *Frances* steamer: on ship valued at 8000*l.*, machinery at 4000*l.*, claiming a total loss.

The material pleas were: 3. that the ship was not lost by the perils insured against; 4. misrepresentation; 5. concealment; 6. that after the making of the policy the plaintiffs, well knowing that the ship was unseaworthy, wrongfully and without any justifiable cause sent her to sea from the port of London on the voyage on which she was lost, and the ship remained, as the plaintiffs always well knew, in such unseaworthy condition from the time she left the port aforesaid until she was lost, and the ship was lost by reason of such unseaworthiness and not otherwise. There was a seventh plea of an alleged illegality, the questions on which we disposed of at the time this rule was argued, and which need not further be noticed. Issue was taken on all the pleas.

The trial came on before me and a special jury at the Guildhall when a very great deal of evidence was produced on both sides, the trial occupying seven days.

The outline of the case, as far as is necessary to make the points of law intelligible, was as follows:—

The ship, at the time of the insurance called the *Frances*, was an iron steam-ship. She was originally built at Amsterdam in 1858, and launched in 1859 for Spanish owners. She was not classed in this country, but there was evidence from which the jury might fairly conclude she was then properly built of good iron. There was no direct evidence as to how the Spanish owners employed her. The defendant gave evidence that in 1868 the ship, which was then called the *Paris*, was lying at anchor in the harbour at Cadiz, and lay unemployed there for about eighteen months. In September, 1871, the *Paris* was lying at Birkenhead afloat, and offered for sale.

Two witnesses were called by the defendant, who inspected her with a view to purchasing her; neither made a regular survey, but both came to the conclusion that she was very dirty, and had been much neglected, and was probably corroded, and they did not purchase. In that month of September, 1871, the plaintiffs, who are iron shipbuilders at Milwall, contracted with the Spanish owners to build them a new ship and to take the *Paris*, then lying at Birkenhead, in part payment, at about 4000*l.*

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She was then brought round to Milwall from Birkenhead with her original boilers on board; they were not fit for use, and she was consequently towed round. The senior member of the plaintiffs' firm gave evidence that the original boilers being still on board led him to conclude that she could not have been much used, and that led him to think well of her. The boilers were taken out, and the vessel was offered for sale to the agent of a firm at Hull, who, after examining her afloat, but not making a regular survey, advised his principals not to buy her; he was called as one of the witnesses for the defendant.

Messrs. Dudgeon were owners of two steamers running between London and Gottenburg for goods and also carrying passengers. They were called the *Mary* and the *Louisa and Fanny*. One of them, the *Louisa and Fanny*, met with a collision, and Messrs. Dudgeon resolved to repair the *Paris* and run her on this line, and to change her name to the *Frances* in compliment to the daughter of one of the partners. She was put in the dry dock and scraped perfectly clean. Messrs. Dudgeon, who were called as witnesses on their own behalf, swore distinctly that they believed her to be quite capable of being made fit for the service; that orders were given to Mr. Harrington, a marine surveyor and engineer, to see that she was properly repaired; and that their people at Milwall were instructed to execute whatever repairs were required; and that there was no stint whatsoever as to the amount of the repairs; and that they fully believed, and still believed, she was made seaworthy. Mr. Harrington confirmed this, and gave positive testimony that everything was done that was required; and that in his opinion she was made a thoroughly good strong ship.

The old boilers being taken out, the boiler space was all open to view, but the ceiling was only partly removed, and the cement was not removed at all, so that the whole of the inside was not visible. There was contradictory evidence amongst the skilled witnesses as to whether the removal of the ceiling and the cement was necessary or not. Mr. Harrington swore positively that it was not at all required. There was strong evidence on the part of the plaintiffs' shipwrights and dock people that everything was done that was requisite. It was difficult to dissect the accounts so as to say how much was due to the putting in of new boilers, and how

much to the repairs of the hull; and the work being done by the plaintiffs' own workmen it was difficult to ascertain the money value of what was done; but there was evidence that a great deal had been done and much expense incurred. It appeared, however, clearly as a fact, that the screw tunnel was left untouched, and was in a decayed state.

The surveyor of the Board of Trade surveyed the outside of the hull, but owing, it was said, to want of time, she was not surveyed inside, and consequently did not obtain a passengers certificate, and ultimately sailed for Gottenburg on the 3rd of February, 1872, without one.

In the meantime the *Frances* had been insured. There was a little, but very little, discrepancy between the witnesses as to what was said at the time of making the insurance. The clerk to the broker said that the burthen of what he said to the defendant's representative was, that the *Frances* was a steamer which Dudgeon had taken in exchange; that he had thoroughly repaired her; was going to put her into his Gottenburg trade similar to the *Louisa and Fanny* and the *Mary*. On cross-examination he stated that he did say she was "thoroughly repaired," but did not, he thought, say "practically rebuilt," and that if he said she was "new" he must have said it in the sense new to that trade. The underwriter's representative said that several slips were laid before him for time policies on steam-ships; that he underwrote without remark those which he had previously known, and amongst others the *Louisa and Fanny*, which he knew as a first-class steamer engaged in the Gottenburg trade, but that he did not know whether those steamers carried passengers or not. When he came to the *Frances* he asked what she was, and as nearly as he could recollect, the answer was, she is a new Gottenburg steamer like the *Louisa and Fanny*—"I do not mean to say she is a new vessel. She is an old boat bought by Dudgeon, who has spent a lot of money on her, and she has been thoroughly repaired and virtually rebuilt."

On the 3rd of February, 1872, as already stated, the *Frances* sailed for Gottenburg with some machinery on deck, but no other cargo, so that she was somewhat crank. As soon as she got out to sea she began to make water. There was no weather to justify

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this, and though there was some discrepancy between the witnesses as to the quantity of water she made, it was certainly more than could be accounted for by any weather she met. She arrived safe at Gottenburg. When she got into smooth water she ceased to leak, and though she was examined the cause of her making water could not be discovered. She took on board a cargo of oats and iron and a deck cargo of wood, and sailed on the 11th of February, at 7 a.m. for London. All went well till the morning of the 12th of February, when she had got out of Vigo Sound into the open sea. Then it began to blow. There was contradictory evidence as to the weather, but the evidence most favourable for the defendant admitted that it blew, that there was a heavy rolling sea, and that it was necessary to put a sail over the stoke-hole to prevent the sea from getting in. The evidence most favourable for the plaintiffs made the wind a gale, but not such as would have made a good ship behave as the *Frances* did. All agreed that she began to labour and to make water, so that the fires were put out. Part of the deck cargo was thrown overboard, and the fires re-lighted with the rest. After twelve hours of pumping the pumps got choked with the oats; there was evidence that if the screw-tunnel had been in proper order this would not have happened. All hands were engaged in pumping to save the ship. On the night of the 14th of February, having ascertained whereabouts they were by the Spurn Light, they endeavoured to get to Hull. The ship being waterlogged did not readily answer her helm. Partly from this and partly from the thickness of the weather the ship went ashore on the morning of the 15th of February, about 5 a.m., having been in this state of distress since the morning of the 12th of February. One of the boats was swamped, but the crew were all saved by a fishing-smack. Part of the cargo was afterwards saved, but the vessel could not be got off, and broke in two, and finally after some months went completely to pieces.

There was very contradictory evidence from surveyors who had seen the wreck as to the state and condition of the plates, &c. When the evidence was completed I stated to the counsel that I proposed to ask the jury on the merits seven questions, which I reduced to writing. These were—

1. Was the representation made by the broker at the time of the making of the insurance as to the condition of the vessel and as to the extent of the examination substantially correct?

2. Did that representation involve in it a statement that the vessel was to carry passengers, and, consequently, had been surveyed by the Board of Trade?

3. Was there a concealment from the underwriters of anything materially affecting the insurance which the plaintiffs knew and the underwriters did not?

4. Was the fact that the ship had not been surveyed and certified for passengers, under the circumstances, one which was material?

5. Was the vessel seaworthy when she started? If not,

6. Was this known to the plaintiffs?

7. Was that unseaworthiness the cause of the loss?

Neither side suggested any other question, and the counsel addressed the jury.

In summing up I explained to the jury that, though in a time policy there is no implied warranty of seaworthiness, yet that any representation made to the underwriters is treated as a basis of the contract, and if (whether innocently or knowingly) there is a substantial difference between the representation and the fact, making the risk materially greater than represented, the policy is not binding; and that a concealment of something known to the assured and not known to the underwriters, which would materially make the risk greater, has the same effect. I pointed out to them that there were two questions of fact for them as to the representation: first, what was the effect of the representation? second, was it substantially true? I assumed, if I did not in express terms say, that the loss, on this evidence, was a loss by the perils of the seas, but that the question whether the assured could recover for such a loss might depend upon the answers to the 5th, 6th and 7th questions; telling them that in asking the 7th question I did not mean to ask them whether it was the sole or immediate cause of the loss, but whether the making water was occasioned by unseaworthiness, and the loss arose from her being water-logged in consequence of that unseaworthiness, so that it would not have happened but for that unseaworthiness. The jury, after being

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out some hours, could not agree on their answers to the 1st, 5th, and 7th questions. They were desired to endeavour to agree. After I had left the court, they agreed on their answer to the 1st question, but were finally discharged without agreeing on the 5th and 7th. Their written answers finally taken were: To the 1st question, Yes. To the 2nd, 3rd, and 4th, No. To the 5th, The jury cannot agree. To the 6th, No. To the 7th, The jury cannot agree. On these findings I directed the verdict to be entered for the plaintiffs on the 3rd and 6th issues.

In the ensuing term a rule for a new trial was obtained by Sir John Karslake generally. It was agreed that if the plaintiffs were entitled to retain the verdict it should be ascertained by an average adjuster what deduction, if any, should be made for salvage. Cause was shewn during the last term, before the Lord Chief Justice, my Brother Quain, and myself. But my Lord having been absent from court on account of indisposition during a considerable part of the argument, he takes no part in the judgment, which is that of my Brother Quain and myself.

We think that the defendant is entitled to treat the case as if the jury had answered the two questions on which they were unable to agree in his favour; and that, if on that supposition the plaintiffs would not be entitled to retain their verdict, then there should be a new trial to ascertain the facts.

The points made on the argument were, first, that the verdict that the representation was substantially correct was not consistent with the actual finding, that the jury could not agree as to whether the ship was in fact seaworthy, or (as we think the defendant is entitled to treat the case for the purpose of the argument), a finding that she was not seaworthy; or at least that this finding was against the weight of the evidence. No complaint was made of the direction in point of law as to this question. We think, however, that it was a question for the jury what the effect of the representation was, and that they might properly think it did not involve a representation that the vessel was actually made seaworthy, but only that the plaintiffs had bonâ fide done, without stint or scamping, all that competent advisers thought necessary to put the vessel in thorough repair, and reasonably believed that their outlay had been sufficient to make her fit for the service. If

the jury took this view of the representation, we think they might reasonably find on this evidence that it was substantially true, even though the vessel, owing to some oversight or neglect on the part of those superintending the repairs, was not, in fact, made seaworthy. The other points made were, that if the vessel was not seaworthy, and the loss was caused by the unseaworthiness, the vessel was not lost by the perils insured against; and that the verdict on the 3rd issue should not therefore have been entered for the plaintiffs; and that, though the jury found that the plaintiffs did not know of the unseaworthiness, that did not disprove the substance of the 6th issue. We think, however, that even if the jury had expressly found that the vessel was not seaworthy, and that the loss was occasioned by that unseaworthiness, it would have afforded no answer to the action, and the substance of the 6th plea would not have been proved. The judgment of this Court on the demurrers in *Thompson* v. *Hopper* (1) has never been reversed, and is binding on us. In the case of *Thompson* v. *Hopper* (2), on appeal, there was much discussion, and a difference of opinion as to what was the proper guide to be given to a jury on the question whether the unseaworthiness caused the loss. Had the finding of the jury been in favour of the defendant on the 6th question, I intended to endeavour to raise the precise points for a court of appeal. As it is, that point does not arise. *Thompson* v. *Hopper* (1), on demurrer, decides that there is in such a case as the present no warranty of seaworthiness at all; and that even if the assured knowingly send a vessel to sea in an unseaworthy state, it affords no answer to an action on a time policy for a loss not shewn to have been produced by that unseaworthiness. But in the same case it was decided that if the assured sent her out in a state not fit to go to sea, knowing it, and the loss was produced by that unseaworthiness, it does afford an answer. Lord Campbell says: "But it is a maxim of our insurance law, and of the insurance law of all commercial nations, that the assured cannot seek an indemnity for a loss produced by their own wrongful act. The plaintiffs said truly that the perils of the sea must still be considered the proximate cause of the loss; but

(1) 6 E. & B. 172; 25 L. J. (Q.B.) 240.
(2) 6 E. & B. 937; 26 L. J. (Q.B.) 18.

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so it would have been if the ship had been scuttled, or sunk by being wilfully run upon a rock. According to the statement in this plea, "the plaintiffs efficiently caused the loss by their wrongful act." (1) This judgment proceeds on the same principle as that of *Bell* v. *Carstairs* (2), where it was held that a ship having been captured and condemned for want of proper documents the shipowners could not recover for the loss, though the owner of goods, if not one of the shipowners, might recover on a policy on goods. The reason of the distinction is pointed out by Lord Ellenborough: "The owner of goods was not liable to suffer in respect of his insurance on account of any defect in the documents belonging to the ship, with the procurement or existence of which he had no concern. In the present case, on the ground that the three subjects of insurance were condemned on account of the common default of all the proprietors in their joint character of shipowners, ... we are of opinion that the assured cannot claim from the underwriter an indemnity for a loss thus occasioned by themselves." At the time when *Bell* v. *Carstairs* (2) was decided there was no special plea, everything being open under the general issue; but it is clear, we think, that the effect of this judgment would have been (after the new rules) to support a plea in confession and avoidance to this effect: "True it is that the ship was lost by a peril insured against, to wit, the capture; but the loss was occasioned by the fault of the plaintiffs themselves, and therefore the underwriters are not bound to indemnify them against it."

We are bound by authority to hold that there is no warranty of seaworthiness in this policy, and the jury have negatived knowledge on the part of the plaintiffs. We think, therefore, that we cannot hold that the remaining averments in the sixth plea, even if proved, would shew that the loss was occasioned by a wrongful act on the part of the plaintiffs, and, consequently, that the substance of the plea was not proved.

But a further question is raised on the third issue. It is said, and we agree, that the underwriters are not bound to indemnify the assured against every loss that occurs during the period insured, but only against those occasioned by perils insured against. And if the damage or loss arises from no unusual cause, though

(1) 6 E. & B. at p. 191. (2) 14 East, 374.

the winds and the waves may be concerned in it, the loss is wear and tear, for which the underwriters are not responsible. If there has been an unusual cause, it is perils of the sea for which they are responsible: *Magnus* v. *Buttemer* (1), *Paterson* v. *Harris* (2), and *Merchants Trading Company* v. *Universal Marine Company.* (3)

But in all cases the law regards the proximate cause of the loss; and it would be difficult to find a better example of what Lord Bacon calls the infinity of the "causes of causes, and their impulsion one on the other," than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was, that when she laboured in the rolling sea she made water; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss.

Two cases were, on the argument, relied on, viz., *Fawcus* v. *Sarsfield* (4), and *Merchants Trading Co.* v. *Universal Marine Co.* (not reported, but of the judgment in which we have been furnished with a copy). We think neither case conflicts with our decision. In *Fawcus* v. *Sarsfield* (4) the plaintiff claimed on a time policy on ship for the loss sustained by putting into a port of distress, and there unloading and repairing the vessel, which had become leaky, as the declaration alleged, by the perils of the seas. The plea which the arbitrator found to be true in fact

(1) 11 C. B. 876; 21 L. J. (C.P.) 119.
(2) 1 B. & S. 336; 30 L. J. (Q.B.) 354.
(3) Not reported.
(4) 6 E. & B. 192; 25 L. J. (Q.B.) 249.

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was, that the ship was unseaworthy, and met with no extraordinary peril, and that the leakiness arose "by and from the said bad and defective condition of the vessel, and the exposure of the vessel to the usual and ordinary force and violence of the wind and waves on that voyage." This seems to be an allegation that the loss was from wear and tear, aggravated by the original bad state of the vessel; and if so, the plea was no doubt good.

In *Merchants Trading Co.* v. *Universal Marine Co.* (1) it appears that the action was on a voyage policy on the ship *Golden Fleece* from the Mersey to Cardiff, whilst there, and thence to Alexandria. On the trial before my Brother Lush it was proved that the *Golden Fleece*, being to all appearance seaworthy, left the Mersey with a few tons of coal on board, and therefore substantially in ballast, and arrived safe at Cardiff, where she went into the docks, and there loaded a full cargo, consisting of 2000 tons of coals. She left the docks and anchored in the Penarth roads, outside Cardiff, in the morning, and on that same night, whilst riding at anchor, suddenly filled with water and foundered, there being neither wind or sea, or anything to account for her going down. The evidence of those on board when she sunk seems to have been such as to make it probable that one of the coal ports had given way. On this my Brother Lush appears to have correctly explained to the jury, that if when she started on the voyage from the Mersey she was not seaworthy, it was a defence; and he further told the jury that the underwriters were answerable for casualties arising from the violent action of the elements, as distinguished from the silent, natural, gradual action of the elements upon the vessel itself, which latter properly belonged to wear and tear. That what the underwriters insured against were casualties that might happen, and not consequences which must happen. He told the jury that the circumstances proved in the case before them, the one question which would solve it all was this, Was the leak from which the vessel foundered attributable to injury and violence from without, or from weakness from within? for that, if it was not attributable to perils of the seas, that is, as he explained it, the violent action of the elements

(1) Not reported.

from without, or any other casualty involved in perils of the seas, the jury could come to no other conclusion than that it was due to an inherent infirmity of the ship itself. On this direction the jury found for the defendants. The verdict was entered for the defendants, both on the plea denying seaworthiness and on that denying that the loss was by perils of the seas; and the Court of Common Pleas refused a rule for a new trial, holding the direction unexceptionable. And we quite agree that the direction was unexceptionable; for if the vessel was so weak as to give way from the mere pressure of the water on her port, without anything more, the proximate cause of the loss was that weakness. But it scarcely needs pointing out how very different the facts proved as regards the loss of the *Golden Fleece* were from those proved in the present case as to the loss of the *Frances*, which, however unseaworthy she may originally have been when leaving London, had crossed the North Sea twice, and was finally lost, because she went ashore after contending with the winds and waves during several days.

We have therefore come to the conclusion that the rule should be discharged.

No point was reserved at the trial, but we give the defendant leave to appeal on all questions arising on the findings of the jury and the direction as to the first six pleas. We give no leave to appeal on the issue on the seventh plea, as to the supposed illegality.

Rule discharged.

Attorneys for plaintiffs: *Cattarns, Jehu, & Cattarns.*
Attorneys for defendant: *Hollams, Son, & Coward.*

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June 12.

THE QUEEN *v.* EDMONDS.

Poor Rate—Valuation List—Amendment by Assessment Committee under Union Assessment Act Committee Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.—*Re-deposit of List—Certiorari—Costs—Practice.*

Notice of appeal against a poor rate having been given to the assessment committee, under 27 & 28 Vict. c. 39, s. 1, they amended the valuation list, and gave notice to the overseers, but the list was not re-deposited as required by s. 21 of 25 & 26 Vict. c. 103:—

Held, that it was not necessary to re-deposit the list.

A contribution order, based on the list as so altered, having been brought up by certiorari and a rule obtained to quash it on behalf of a ratepayer, whose rating was but inappreciably affected by the alterations; no recognizances having been entered into; the Court discharged the rule with costs, as a vexatious abuse of the process of the Court.

Rule calling on the prosecutors to shew cause why two orders of contribution made by the guardians of the Newent Union on the overseers of the parish of Newent, and dated the 24th of October, 1873, and the 30th of January, 1874, respectively, and which orders had been brought up by certiorari, should not be quashed.

It appeared from the affidavits that a valuation list for the parish of Newent was duly made out under the Union Assessment Act, 1862 (25 & 26 Vict. c. 103), was finally approved by the Union Assessment Committee on the 1st of August, 1864, was duly signed and deposited as required by s. 20, and was delivered to the overseers of the parish under s. 23. Supplemental valuation lists had from time to time been made and approved, and signed and deposited as required by ss. 25, 26, 27.

In March, 1873, the Newent Gas Company, under s. 1 of 27 & 28 Vict. c. 39, gave notice to the assessment committee of their intention to appeal against the poor rate then in force, made on the 8th of November, 1872, and required the committee to hear their objection, and it was heard accordingly on the 27th of March, 1873, and the gross estimated rental of the company was reduced from 80*l.* to 40*l.*, and the rateable value from 53*l.* to 26*l.* 10*s.* On the 31st of October, 1873, further objections to the list were made by two persons, and on the hearing of the objections the rateable

value of the property of those two persons was also slightly reduced by the committee. These alterations in the lists were duly made by the committee, and were by direction of the committee entered and signed by the clerk on the valuation list, and notice thereof was given to the overseers, who altered the then current rates accordingly; but the alterations were not signed nor was the list, after making the alterations, re-deposited, nor a copy delivered to the overseers as required by ss. 20, 21, and 27 of the Act of 1862, and s. 30 of 31 & 32 Vict. c. 122, with respect to original or supplemental valuation lists and the alterations made therein before they are finally approved. The contribution orders in question were made and based on the valuation list as it stood after the alterations of the 27th of March and the 30th of October, 1873, respectively.

The certiorari and rule had been obtained on behalf of Edmund Edmonds, who was a person rated, and so "aggrieved" by the alterations in the list; but the deductions made in the list by reason of the alterations were so inappreciably small that practically he was not affected by them.

A. Wills, Q.C., and *Anstie* shewed cause. There is nothing in s. 1 of 27 & 28 Vict. c. 39, to require the re-deposit of the valuation list which has once been finally approved. Sect. 22 of the original Act, 25 & 26 Vict. c. 103, gave an appeal to the quarter sessions, and if, on appeal, the quarter sessions alter the rate and the valuation list is altered accordingly, no re-deposit is necessary. Sect. 1 of the later Act places the assessment committee in the first instance in the place of the quarter sessions. Why therefore should there be any re-deposit in such a case? It would be extremely inconvenient if a re-deposit were necessary upon every trivial alteration. The list would never be final.

The Court then called upon

Manisty, Q.C., and *A. P. Stone* in support of the rule. No distinction can be drawn between a trivial alteration and one of great magnitude; and it would be extremely unjust in the latter case if a ratepayer, in the position of Edmonds, were to have no opportunity of objecting to the reduction of another's rating in conse-

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quence of which he would have to pay more. It is true nothing is expressly stated in s. 1 of the later Act as to re-deposit; but by s. 12 the provisions of the Act of 1862 are incorporated; and by s. 21 of that Act, when the committee make any alterations in the valuation of any hereditament they must cause the valuation list to be re-deposited.

[COCKBURN, C.J. If there had been an appeal under s. 22 of the first Act to the quarter sessions and the result had been to amend the rate, no re-deposit of the valuation list would have been necessary. Sect. 1 of the later Act comes, as it were, as a proviso to s. 22, and is simply a qualification of that section; so that now the assessment committee are substituted in the first instance for the quarter sessions. Why, then, should a re-deposit be made if the committee make the alterations without the intervention of the quarter sessions? Sect. 1 says nothing about a re-deposit; and there is great force in the argument of the inconvenience that would result from holding it to be necessary.]

If there is no re-deposit there is then no notice whatever to the public of the alteration which has been made.

COCKBURN, C.J. For the reasons I have already given, and which it is unnecessary to repeat, I am of opinion that this rule must be discharged.

QUAIN, J. I am of the same opinion. If you look at the first Act, you find that by s. 24 every valuation list approved by the committee and delivered to the overseers shall be the valuation list of the parish until a new one is approved and delivered. By s. 25, whenever property not in the list becomes rateable, or changes are made, a supplemental list shall be made out; by s. 21, the committee may make alterations, and there is then to be a re-deposit of the list. Then s. 22 gives an appeal to sessions; and s. 1 of the Act of 1864 comes in by way of proviso to s. 22 (as the Lord Chief Justice has pointed out), and before appealing the party aggrieved must go before the committee, and they have full power to call for and amend the list, and if they amend it they are to give notice to the overseers, who are to alter the

current rate accordingly. It would therefore appear that s. 1 is not confined to new objections, and although the same objections to the valuation list may already have been raised and heard under s. 19 of the first Act, there must be a re-hearing of them before an appeal can be heard against the rate founded upon the valuation list. This is rather strange; but it is enacted in the strongest and most general terms that no appeal shall be heard against a rate until after the committee have refused to give relief by amending the list. It is to be observed that the committee by s. 1 of the second Act have full power to amend the list, although it has been approved and no subsequent list has been transmitted to them; but there is no substantive provision for re-deposit, as is expressly required under s. 21 of the first Act. Manifest inconvenience would arise if a re-deposit were necessary in such a case, for seven days at least are to be allowed for hearing fresh objections after each re-deposit; and so the valuation list would in effect never be settled. I am therefore of opinion that no re-deposit was necessary in the present case, and that the rule must therefore be discharged.

ARCHIBALD, J. I am of the same opinion, on the short ground that s. 1 of the Act of 1864 is really intended to be an amendment of s. 22 of the Act of 1862, and that it contains no express enactment making a re-deposit necessary; and if there be any ambiguity as to whether or not it was intended that there should be a re-deposit, reasons of convenience weigh with me, and cause me to construe the enactments as not intending to make a re-deposit necessary.

A. Wills, Q.C., asked for costs.

A. P. Stone, contrà, pointed out that there were no recognizances entered into when the certiorari was obtained: and that unless costs were expressly given by the statute the Crown never receives nor pays costs: *Rex* v. *Jenkinson.* (1)

COCKBURN, C.J. We are of opinion that the rule must be

(1) 1 T. R. 85.

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discharged with costs. I do not see any reason why the Court should not exercise the jurisdiction which it undoubtedly possesses of visiting a vexatious abuse of any process of the Court with the payment of costs. The proceeding in the present case is altogether vexatious.

Rule discharged with costs.

Attorneys for prosecutors: *Taylor, Hoare, Taylor, & Cooke, for C. J. Cooke, Newent.*

Attorneys for defendant: *Torr & Co.*

END OF TRINITY TERM, 1874.